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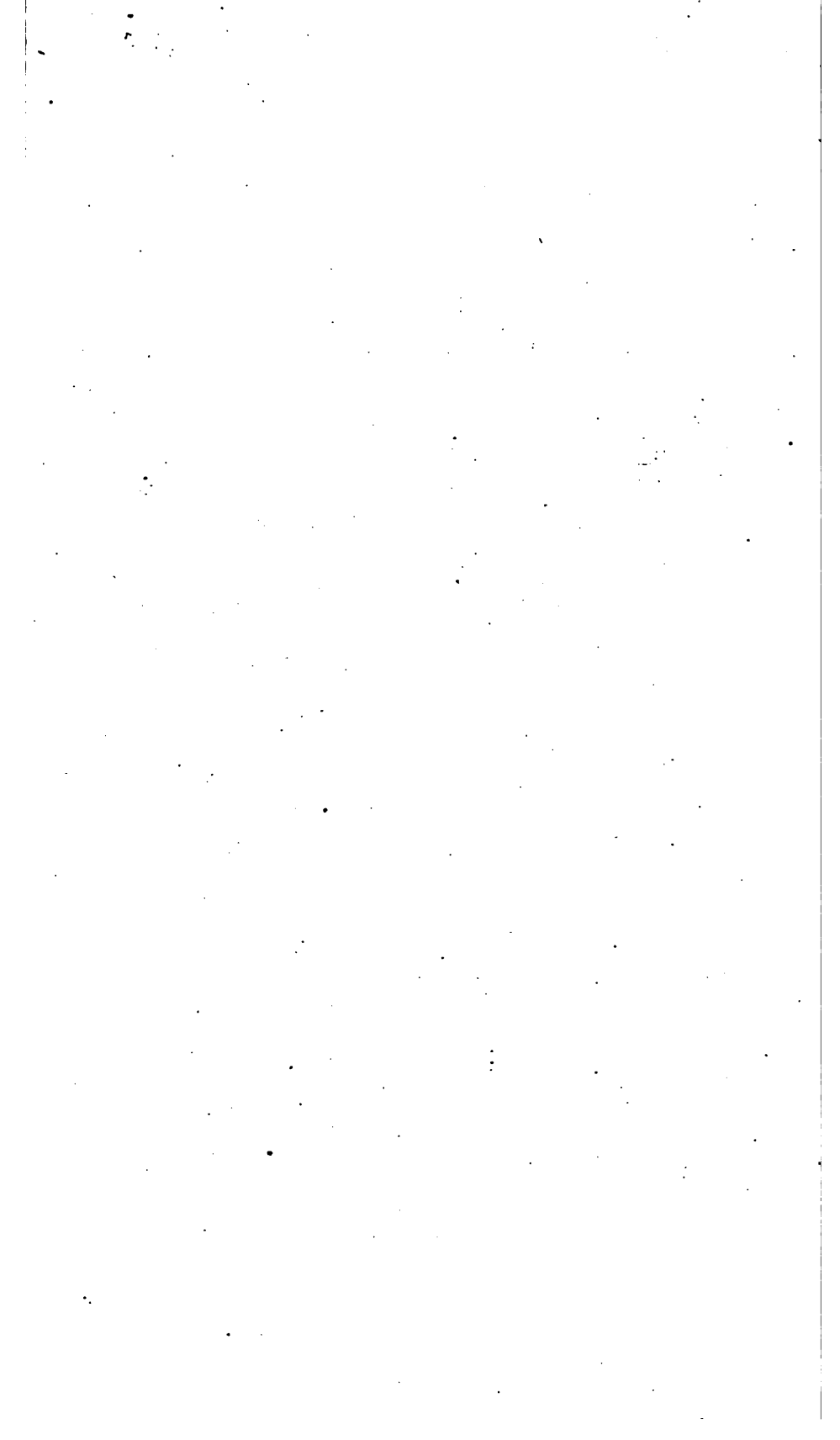
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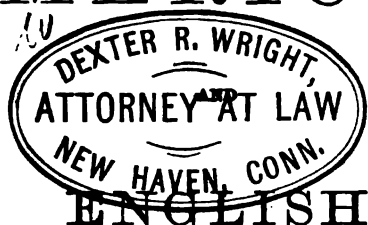
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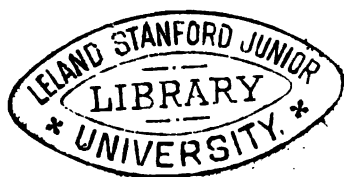
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A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT
IN AMERICA AND ENGLAND.

VOL. IV.

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FRANCES H. BARTON, Plaintiff in Error,

v.

JOHN S. BARBOUR, Receiver of the Washington City, Virginia
Midland, and Great Southern R. R. Co.

(*Advance Case. United States Supreme Court.*)

The general rule that a receiver cannot be sued without leave of the court by which he was appointed, applies to suits brought against him to recover a money demand, or damages, as well as to those the object of which is to take from his possession property which he is holding by order of the court.

The fact that a receiver is in possession of a railroad, and is by the order of court engaged in the business of a common carrier thereon, does not take his case out of the rule that he is only answerable to the court by which he was appointed, and cannot be sued without its leave.

No suit can be maintained against the receiver of a railroad, who is by order of court conducting the business of a common carrier thereon, for injury to persons or property caused by his negligence, or that of his servants, without leave of the court by which he was appointed.

The trial by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury.

If the adjustment of a demand against the receiver involves any dispute in regard to the facts on which his liability depends, or in regard to the amount of the damages sustained, a court of equity, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts.

A court of equity may, in its discretion, in view both of the public and private interests involved, authorize its receiver of the road and other property of a railroad company to keep the same in repair, and to manage and use it in the ordinary way, until it can be sold to the best advantage of all interested therein.

When the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty, by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has not jurisdiction without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence, or that of his servants, in the performance of their duty in respect of such property.

THIS was a suit brought by Frances H. Barton, the plaintiff in error, against John S. Barbour, the defendant in error, as receiver

of the Washington City, Virginia Midland, and Great Southern R. R. Co.

The declaration was as follows: "The plaintiff, Frances H. Barton, sues the defendant, John S. Barbour, as receiver of the Washington City, Virginia Midland, and Great Southern R. R. Co., a corporation organized under a law of the State of Virginia, and doing business and having an office in the District of Columbia, for that the defendant, on the 11th day of January, 1877, was running and operating a railroad through the State of Virginia, and upon said railroad the defendant was a common carrier of freight and passengers for hire. That, on the day and year aforesaid, the plaintiff was a passenger in a sleeping-car upon said railroad, and by reason of a defective and insufficient rail upon the track of said railroad the car in which the plaintiff was a passenger was thrown from the track and turned over down an embankment, and she was greatly hurt and injured, and her bodily health permanently injured; that the defendant did not use due care in relation to said defective rail, and the injury to the plaintiff was occasioned by the negligence and carelessness of the defendant, but the plaintiff used due care. The plaintiff claims \$5,000 damages."

To this declaration the defendant below filed a plea to the jurisdiction, in which he alleged that at the time of service of process on him he was the receiver of all the property, rights and franchises of said railroad company, by virtue of a decree made by the circuit court for the city of Alexandria, in the State of Virginia, on July 13, 1876, in a cause depending on the equity side of said court, wherein John C. Graham, who sued for himself and others, was complainant, and said railroad company and others were defendants; that said decree authorized him to defend all actions brought against him as such receiver, by the leave of said court, and declared that he should not in any case incur any personal or individual liability in conducting the business of said railroad, by reason of any act done by him or his servants, he acting in good faith and in the exercise of his best discretion, but that the property in his hands as such receiver should nevertheless be chargeable with any claim which might be established in any action brought against him as such receiver under leave of the court first had and obtained.

The plea then averred that the plaintiff had not obtained leave of said court to bring and maintain said suit. Wherefore the defendant prayed judgment whether the court could or would take further cognizance of said action.

The plaintiff filed the general demurrer to the plea.

The court below gave judgment overruling the demurrer, and against the plaintiff for costs. This writ of error is prosecuted to reverse that judgment.

Woods, J.—The question presented by the record is the sufficiency of the plea to the jurisdiction of the court.

The defendant in error insists that the Supreme Court of the District of Columbia had no jurisdiction to entertain the suit without leave of the court by which he was appointed receiver.

The plaintiff in error concedes it to be a general rule that, before suit is brought against a receiver, leave should be obtained from the court by which he was appointed, and contends that the only consequence resulting from the prosecution of such a suit without leave is that the plaintiff may be restrained by injunction or attached as for a contempt.

He insists, however, first, that the general rule requiring leave applies only to cases where the purpose of the suit is to take from the receiver property which is actually in his possession, placed there by order of the court. We conceive that the rule is not so limited.

The evident purpose of a suitor who brings his action against a receiver without leave, is to obtain some advantage over the other claimants, upon the assets in the receiver's hands. His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. *Hall v. Smith*, 2 Bing. 156; *Camp v. Barney*, 11 N. Y. 373; *Commonwealth v. Runt*, 26 Penn. 235; *Thompson v. Scott*, 4 Dill. 588.

If he has the right in a distinct suit to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it without leave. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust, of any attempt to enforce satisfaction of his judgment, would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver. A suit, therefore, brought without leave, to recover judgment against a receiver, for a money demand, is virtually a suit, the purpose of which is, and effect of which may be, to take the property of the trust from the receiver's hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against the receiver to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.

And it has been so held in effect by this court. In the case of *Wiswell v. Sampson*, 14 How. 652, this court said: "It has been argued that a sale of the premises on execution and purchase oc-

casioned no interference with the possession of the receiver, and hence no contempt of the court, and the sale, therefore, in such a case should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the result of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

So in *Ames v. Trustees of Berkenhead Docks* 20 Beav. 332, Lord Romilly, Master of the Rolls, said that it is an idle distinction that the rule forbidding any interference with property in the course of administration in the court of chancery only applies to property actually in the hands of the receiver, and declared that it applied to debts, rents and tolls, which the receiver was appointed to receive.

It is next asserted by plaintiff in error that the fact that the receiver in this case is in possession of, and is conducting the business of, a railroad as a common carrier, takes his case out of the rule that he is only answerable to the court by which he is appointed, and cannot be sued without its leave. His contention is that parties who deal with such a receiver, either as freighters or passengers upon his railroad, may for any injury suffered, either in person or property, sue the receiver without leave of the court by which he was appointed.

We do not perceive how the fact that the receiver, under the orders of the court, is doing the business usually done by a common carrier, makes his case any exception to the rule under consideration. It was said by this court in *Cowdrey v. Galveston, etc., R. R. Co.*, 93 U. S. 352, that "the allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid." This puts claims against the receiver, in his capacity as a common carrier, on the same footing precisely as the salaries of his subordinates, or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured in person or property by the negligence of the servants of the receiver, can, without leave, sue him to recover his damages, then every conductor, engineer, brakesman, or track-hand can also

sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property in the hands of a court of equity to be controlled by other courts, at the instance of impatient suitors, without regard to the equities of other claimants, and to permit the trust property to be wasted in the costs of unnecessary litigation.

Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct a feigned issue to settle the contested facts.

The claim of the plaintiff in error, which is against the receiver for a personal injury sustained by her while travelling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way.

We, therefore, think that the demand of the plaintiff in error is not of such a nature that it may be prosecuted by suit without leave of the court.

The plaintiff in error lastly contends that want of leave to bring the suit does not take away the jurisdiction of the court in which it was brought to hear and determine it, but only subjects the plaintiff to liability to be attached for contempt, or be enjoined from its further prosecution. In other words, he says that leave to prosecute the suit is not a jurisdictional fact, and that, therefore, the plea to the jurisdiction should not have been sustained.

Our decision upon this question will be limited to the facts of this case, which are that the receiver was appointed by a court of the State of Virginia, and the property in course of administration was in that State; the suit was brought in a court of the District of Columbia, a foreign jurisdiction, and the cause of action was an injury received by plaintiff in the State of Virginia, by reason of the negligence of the defendant while carrying on the business of a railroad, under the orders of the court by which he was appointed. No leave was obtained to bring the suit, and it does not appear that any application was made, either to the receiver or to the court by which he was appointed, to allow and pay the demand of the plaintiff in error.

Upon these facts we are of opinion that the Supreme Court of the District of Columbia had no jurisdiction to entertain a suit.

This point has been substantially settled by this court in the case of *Peale v. Phipps*, 14 How. 368.

In that case it appeared that, under a law of the State of Mississippi, by the decree of the circuit court of Adams county in that State, the charter of the Agricultural Bank at Natchez was declared forfeited and the corporation dissolved, and Peale, the plaintiff in error, appointed trustee and assignee of its assets, and was the sole legal representative of the corporation; that he became legally liable to the creditors of the bank to the extent of the assets, and that he had assets in his possession sufficient to pay all the debts of the corporation. The defendants in error claimed that there was due them from the bank a large sum of money on account of mesne profits, etc., of certain real estate in Natchez, from which they had been unlawfully expelled by the bank, and the possession of which they had recovered from the bank in an action of ejectment. The defendants in error presented their claim to Peale, the receiver, for allowance as a valid claim against the bank, who refused to admit or allow it, or any part of it.

Thereupon the defendant in error brought suit against Peale in the United States Circuit Court for the Eastern District of Louisiana, to recover said mesne profits, and effected service upon him in that district. Peale, among other defences, filed an exception, in which he denied the jurisdiction of the court. This was overruled and judgment was rendered against him for \$20,058, to be satisfied out of the assets of the bank in the hands of Peale as trustee. The case having been brought on error to this court, the judgment was reversed. The court, Chief Justice Taney, delivering its opinion, said: "As we think this exception," the one just mentioned, "decisive against the jurisdiction of the circuit court of Louisiana, it is unnecessary to set out the other exceptions. We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county and subject to its order, and was not authorized to dispose of any assets or pay any debts due from the bank, except by order of the court. He had given bond for the performance of his duty and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an officer and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it and wrest it from the hands of its agent and thereby put it out of his power to perform his duty." And the court declared that the facts stated in the petition showed "that the circuit court of Louisiana had no jurisdiction" of the case.

That case differs from the one now under consideration only in this: that it was a suit to recover a judgment against the trustee

and receiver upon a demand due from the bank before his appointment, while the present case seeks to establish a demand against the receiver for a claim which, according to the decision of this court (*Cowdrey v. Galveston, etc., R. R. Co., supra*), forms a part of the charges and expenses of executing that trust. Such charges are specially subject to the control and allowance of the court which is administering the trust property.

We think, therefore, that the case just cited is decisive of this.

The argument is much pressed that by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation, or against the receiver, will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. To support this view the following cases are cited: *Palys v. Jewett*, New Jersey Court of Error and Appeals, Am. Law Reg., Sept., 1880, 553; *Kinney v. Crocker*, 18 Wis. 80; *Allen v. Central R. R. of Iowa*, 42 Iowa, 683.

But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be considered or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.

Thus, upon a bill filed for an injunction to restrain the infringement of letters-patent, and for an account of profits for past infringement, it is now the constant practice of courts of equity to try without a jury issues of fact relating to the title of the patentee, involving questions of the novelty, utility, prior public use, abandonment, and assignment of the invention patented. The jurisdiction of a court of equity to try such issues according to its own course of practice is too well settled to be shaken.—(*Rubber Co. v. Goodyear*, 9 Wall. 788; *Cawood Patent*, 94 U. S. 695; *Marsh v. Seymour*, 97 U. S. 348.)

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion. True, if one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrongdoer in an action at law for its recovery.

Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation. Claims against the company must be presented in due course, as the court having charge of the case may direct. But if the receiver by mistake or wrongfully takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting *ultra vires*. (*Parker v. Browning*, 8 Paige, 338; *Paige v. Smith*, 99 Mass. 395; *Hills v. Parker*, 111 Mass. 508.) So far the case seems plain. But if claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labor performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress. The new and changed condition of things which is presented by the insolvency of such an institution as a railroad company, has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets. Two very different courses of proceeding are presented for adoption. One is the old method, usually applied to banking, insurance, and manufacturing corporations, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will fetch at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all parties having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claims.

It is evident that the first method would often be highly injurious and would result in a total sacrifice of the property. Besides, the cessation of business for a day would be a public injury. A railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, which neither the company nor any creditor or mortgagee can interfere with. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right by which the courts when they take possession of the property authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was

designed and constructed, so that the public may not receive detriment by the non-user of the franchises. And in most cases the creditors cannot complain because their interest as well as those of the public is promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for non-user.

As a choice, then, of least evil, if not of the most positive good (but generally of the latter also), it has come to be settled law that a court of equity may and in most cases ought to authorize its receiver of railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of the court to do this was expressly recognized in the case of *Wallace v. Loomis*, 97 U. S. 146.

But here arises a dilemma. If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself whilst carrying on the business of the railroad was, it would become impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities. It has, therefore, been found necessary, and has become a common practice for a court of equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suit unless leave is first obtained of the court by which he was appointed.

If the court below had entertained jurisdiction of this suit it would have been an attempt on its part to adjust charges and expenses incident to the administration by the court of another jurisdiction of trust property in its possession, and to enforce the payment of such charges and expenses out of the trust property without the leave of the court which was administering it, and without consideration of the rights and equities of other claimants to the fund. It would have been an usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distribute the trust assets to creditors equitably and according to their respective priorities.

We, therefore, declare it as our opinion that when the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property.

It follows from these views that the judgment of the Supreme Court of the District of Columbia must be affirmed.

MILLER, J., dissenting.

The rapid absorption of the business of the country of every character by legally authorized corporations, while productive of much good to the public, is beginning also to develop many evils. Not the least of these evils arises from the failure of the corporations to pay their debts and perform the duties which by the terms of their organization they have assumed. One of the most efficient remedies for the failure to pay debts, when it arises from the inability of the corporation to do so, is to place the corporation in the hands of a receiver, that its affairs may be wound up, its debts paid, and, if anything remains, it may be distributed among its stockholders. Of the beneficial operation of this mode of closing out an insolvent corporation there can be little doubt, and when this is done with despatch, and the property of the concern is made to pay its debts and its dead body buried out of sight as soon as possible, no objection can be made to the procedure, and all good citizens and all the courts should contribute, as far as they may, to this desirable object.

In regard, however, to a certain class of corporations—a class whose operations are as important to the interests of the community as any other, and as intimately connected with their business and social habits—the creation of receiverships by courts of chancery, the powers conferred on the receiver, and the duration of their office, has made a progress which, since it is wholly the work of courts and not of legislatures, may well suggest a pause for consideration. It will not be necessary to any observing mind to say that I allude to railroad corporations. Of the many thousand miles of railway in my judicial circuit, and of the fifty or more corporations who own or have owned them, I think I speak within limits in saying that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the road, collect its means and pay its debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He generally takes the road and all its appurtenances out of the hands of the company which is its owner, operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debt of the corporation, but quite as often adds to the sum of these debts, and injures the prior creditors by creating a new and superior lien on the property pledged to them.

All this time the receiver, in the use of the company's road and rolling-stock, is performing the functions of a common carrier of goods and passengers. He makes contracts and incurs obligations many of which he fails to perform.

The decision which has just been announced declares that for these failures he cannot be sued in a court of law. That by virtue of his receivership, he and all his acts, and the business operations of the road which he runs, are exempted from the operation of the common law, and that parties who deal with him do so on the implied understanding that they abandon the right to have their complaints tried by jury or by the ordinary courts of justice, and can only obtain such relief as may be had at the hands of a master in chancery of the court which appointed the receiver.

When a receiver is appointed to wind up a defunct corporation, when no power exists to make new contracts or enter upon the performance of new duties—when the sole duty of the receiver is to convert the property of the corporation into a fund for the payment of its debts, and for distribution among those who are entitled to it—a very strong reason exists why the court which appointed the receiver should alone control him in the performance of those duties, and in such cases the court of chancery has the undoubted right to protect its receiver by injunction against parties suing him in other courts, and by punishing such parties for contempt of the court.

And it is in recognition of this principle, and to this class, that the cases of *Wiswell v. Sampson*, 14 Howard, 52, and *Peale v. Phipps*, belong. In the former case the court decided that a sale of property under a judgment of one court which was in the actual possession of a receiver appointed by another court, did not confer a valid title as against the sale of the same property subsequently made under an order of the court whose receiver had held possession all the time. The court did not decide that the receiver could not have been sued at law for any tort committed by him as receiver.

The case of *Peale v. Phipps*, 14 Howard, R., carries the doctrine to an extent to which it had not been carried before, but it was based upon the proposition that Peale, as the trustee under the law of Mississippi, appointed by a court of that State to close out and distribute the assets of a broken bank, could not be made amenable as such trustee to the jurisdiction of a court of the State of Louisiana. The reason being that the fund, out of which alone the plaintiffs could be satisfied, was in the control of the court in Mississippi. The debt sued for in that case was one created by the bank before it was placed in the hands of the receiver. When the receiver was appointed the bank in effect ceased to exist, and no business could be done by it or debts contracted in its name. There remained solely the duty of realizing its assets and paying its debts.

In the case before us the receiver is sued for his own tort in regard to a personal injury to plaintiff. For an act done by him or by his agents in the transaction of business as a common carrier, in which business he was largely and continuously engaged. Why

should he not be sued like any one else for such a course, in any court of competent jurisdiction?

The reply is because he is a receiver of the road on which plaintiff was injured, and holds his appointment at the hands of a Virginia court of chancery. If this be a sufficient answer, then the railroad business of the entire country, amounting to many millions of dollars per annum, may be withdrawn from the jurisdiction of the ordinary courts which have cognizance of other matters of like character, and all the disputes arising out of these vast transactions must be tried alone in the court which appointed the receiver. Not only this, but the right of trial by jury, which has been regarded as secured to every man by the constitutions of the States and of the United States, is denied to the person injured, and he is compelled, though his case be one with no element of equitable jurisdiction in it, to submit it to a court of chancery or to one of the masters of such a court.

In actions for personal injuries, which have always been considered as eminently fitted for a jury, and especially in the assessment of damages, this constitutional right is denied because it is a receiver of a railroad and not its owners, who have done the injury.

Before I can give my assent to such a principle I must be well assured that the law as heretofore expounded demands it.

So far from entertaining such a conviction, I think the principles which govern the relations of the common-law courts and courts of equity where, as in the courts of the United States, these jurisdictions have been kept separate, are opposed to such a doctrine.

In England in the contests between these courts it was never claimed that the court of chancery could act directly upon the court of law or that the latter was bound in any way to follow the decisions of the former. Nor could the chancellor direct his writ to the common-law court or its officers, but if it was determined to give any equitable relief in the matter pending before the law court, the injunction or other process of the chancery was directed to the suitor and upon him alone was the power of the court exercised. In the class of cases before us, if the court of chancery was of opinion that the plaintiff was improperly interfering with the functions of the receiver it could restrain him by writ of injunction or punish him by attachment for contempt. If, however, plaintiff could not be reached by the chancery court, it is no more than the evil of many other cases where a defendant cannot be found when he is wanted in a court of justice.

But I know of no principle, nor of any precedent, whereby a court of law, having before it a plaintiff with a cause of action of which that court has jurisdiction, and a defendant charged in regard to his own act, also within the jurisdiction, is bound or is even at liberty to deny the party his lawful right to a trial of his cause

because the defendant is receiver of some other court, and to leave the suitor to that court for remedy, where it is known that some of the most important guarantees of the trial to which he is entitled and which are appropriate to the nature of his case, will be denied him.

Whatever courts of equity may have done to protect their receivers, and may do to protect the fund in their hands, it is no part of the duty of courts of law to deny to suitors properly before them the trial of their rights which justice requires and which the Constitution and the law guarantee.

These views are well sustained by the authorities collected in the brief of plaintiff's counsel, especially in *Angell v. Smith*, 9 Vesey, jr. 335; *Hill v. Parker*, 111 Mass. R. 508; *County Bank v. Risle*, 19 N. Y. 369; *Camp v. Barny*, 4 How. 373; *Sprague v. Smith*, 29 Vermont, 421.

The doctrine is stated with admirable precision by the Supreme Court of Wisconsin in the case of *Kinney v. Crocker*, 18 Wis., R. 80, in the following language:

"But in all these cases it is not a question of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under such circumstances and itself dispose of the matter involved." "It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law and no defence to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages."

It is asserted by counsel, whose brief shows the extent of his research, that no case can be found where such a plea has been sustained in an English court. I regret to say that in my opinion the judgment just rendered here is without support in authority and unsound in principle.

SOLON HUMPHREYS et al.

v.

JOHN ALLEN, Receiver, et al.

(From Advance Sheet Illinois Reports, vol. 101. January 18, 1882.)

If the holder of railroad bonds secured by trust deeds on the road, having notice of the appointment of a receiver, and an order of court directing him on his petition to issue certificates of indebtedness on which to raise money to discharge a chattel mortgage on the personal property of the company, and to pay taxes, current expenses, etc., and making such certificates a prior and first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued and sold to bona fide purchasers, or paid out to creditors of the company. After their issue and sale, it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject matter to which the certificates were applied was within the scope of the power of the court in the preservation of the property for the benefit of all concerned.

APPEAL from the Appellate Court for the Second District:—heard in that court on appeal from the Circuit Court of Peoria county; the HON. DAVID McCULLOCH, Judge, presiding.

On May 21, 1864, the Peoria, Pekin and Jacksonville R. R. Co. executed its 1200 coupon bonds, payable to Francis Cooley, or bearer, of which 800 were each for \$1000 principal, and 400 were each for \$500 principal, and they all bore interest, payable annually, at the rate of seven per cent. per annum, after January 1, 1865, and the principal was payable July 1, 1894. These bonds were numbered consecutively, from 1 to 1200. To secure the payment of these bonds, this company, on the same day, executed a deed conveying to Francis Cooley and James Buell, as trustees, all the real and personal property of the company, then acquired or thereafter to be acquired. By a clause in the bonds, default in the payment of any part of any installment of interest for six months after demand therefor, was to render the whole of such bonds due and payable at once; and by a clause in the deed, after a lapse of six months after such default, the trustees were authorized to take possession under the mortgage, upon the written request of any two or more of the holders of such bonds, and sell the property, etc. The company failed to pay a part of the interest due July 1, 1871, and also made default in payment of large sums of interest falling due thereafter. After the making of these bonds and this mortgage, the company made an issue of a series of second mortgage bonds.

At the February term of that court, for the year 1878, John Allen and John H. Allen, holders and owners of a large number of both first and second mortgage bonds, filed a bill in the circuit court of Peoria county, alleging demand of interest past due, default of payment thereof, and the insolvency of the company; alleging that the principal of all the bonds had become due, and asking foreclosure, and for the appointment of a receiver to take charge of the property and manage and operate the same. At that term John Allen was appointed such receiver, and entered immediately upon his duties as such.

Afterwards, at the May term, 1878, on the petition of Allen, as such receiver, an order of court was made and entered of record, reciting, in substance, that at the time of the appointment of such receiver the railroad company had become, and was, indebted for services, supplies, rentals (incurred within the preceding six months), and for unpaid taxes, \$67,831.51; and that the company was also indebted on March 4, 1878, to various persons, in the sum of \$81,600, which had been borrowed and expended in repairs and improvements of the road, and for the protection of the credit of the company, and being so indebted, executed to William W. Booraem, as trustee for such persons, a chattel mortgage upon certain of its engines and rolling stock, acquired by the company after the adoption of the constitution of 1870, and declaring the indebtedness for services, supplies, repairs and rentals a first lien upon the property of the railroad company; and declaring the chattel mortgage a valid lien upon the engines and rolling stock therein mentioned; and finding that it would be for the best interests of the railroad company, and for the preservation of its property, and the saving of interest on the chattel mortgage, that the receiver should be authorized to raise money on certificates to be issued by him, and ordering, in substance, that the receiver be authorized to borrow money sufficient to pay all of such indebtedness, and to issue to the parties from whom he may borrow, receiver's certificates, bearing interest; and for the payment of such certificates he may use any part of the receipts or current revenue of the road which may be in his hands, in excess of current expenses; and further ordering, that the certificates issued to provide for the indebtedness for supplies, services, etc., shall be designated on their face as class "A," and that those issued to provide for the payment of the debt secured by the chattel mortgage shall be designated on their face as class "B." And it was further ordered, that all certificates so issued should be a valid and first lien upon all the property, real, personal and mixed, of such railroad company, and that the receiver report to the court the persons to whom such certificates may be issued, and on what account, the amount, time of payment, and rate of interest.

When this order was made, the railroad company and the trust-

ees in the first and second mortgages were parties to the proceeding, and the trustees expressly consented to the order; but Mr. Constable was not a party, nor was Humphreys, Jessup, Terry and Field, nor bondholders other than the Allens, parties to the record at that time. The record, however, does show that Mr. Constable, who at that time was the holder, for himself or others, of the bonds now owned by Humphreys, Jessup, Terry and Field, was a director of the railroad company, and was aware that the making of the chattel mortgage had been authorized by the board of directors, and of the fact that the same had been executed. The record also shows that he was present at a meeting of the board of directors on June 11, 1878, where it was reported to the board that the road had been placed in the custody of the receiver, and that an order had been made for the issue of receiver's certificates for the purposes named, and which it was ordered should be a first lien, as above stated.

During the summer of 1878, the receiver issued certificates of class "A" to the amount of \$67,483.65. Before the 1st of March, 1879, he issued also certificates of the class "B" to the amount of \$79,497.08, and the issuing of all of them was duly reported to the court. Of these certificates, Elizabeth Bayard held of class "A" to the amount of \$50,000 (numbers 7 to 16 inclusive), and of class "B" to the amount of \$25,000 (numbers 1 to 5 inclusive, and numbers 17 and 18); and William Oathout of class "A" held certificate number 6, amount \$5,000, purchased in good faith for value, without notice of any defect or vice in them. The other certificates were given either for money borrowed or in satisfaction of debts which the receiver had been ordered by the court to pay, and those receiving such certificates surrendered the securities held by them for such debts. All this was known to Mr. Constable, who was a holder of a large amount of the bonds secured by the mortgages. He did not intervene in the litigation, or in any manner object to what he knew was being done.

On the 10th of May, 1879, James M. Constable sold to Solon Humphreys, Morris K. Jessup, John P. Terry and Cyrus W. Field, first mortgage bonds to the amount of \$692,000, with all outstanding coupons, and also second mortgage bonds of the company to the amount of \$664,000, with all outstanding coupons thereto attached; also, preferred stock of the company to the amount of \$164,400; also common stock of the company to the amount of \$604,700. The price at which this purchase was made was \$380,600. Ten per cent of the same was paid in cash; ten per cent of the same was to be paid in November, 1879; twenty per cent in May, 1880, thirty per cent in May, 1881, and thirty per cent in May, 1882, with interest at the rate of six per cent per annum, payable semi-annually. By their agreement the bonds and stock were to be held by the Central Trust Company of New York, as collateral security

for the payment of the purchase money, the buyers having the option to pay the same, with accrued interest, at any time within three years. It is recited in this agreement, that it was understood "that General Wager Swayne is to proceed, under the instructions of said Field, Jessup, Terry and Humphreys, to take such legal measures as may be requisite to foreclose the road, and also to change the receiver at any time, all costs and expenses of such proceedings to be borne by Jessup, Field, Terry and Humphreys, and also the expense of the trust."

On June 14, 1879, Francis B. Cooley and James Buell filed their cross-bill in the cause, setting up that they were trustees under the first mortgage, and charging that all the principal sums in the bonds had become due by default of payment of interest, and praying a foreclosure of the first mortgage.

On July 14, 1879, Humphreys, Jessup, Terry and Field having intervened and been made parties, were admitted in the chancery cause as co-complainants with the Allens, in which they set up their ownership of the bonds which they purchased from Constable, and charge that the receiver's certificates were improvidently authorized to be issued, and insisting that they ought not to be held a lien prior to their rights as holders of the mortgage bonds.

On the 7th of August, 1879, a decree of foreclosure was rendered finding the whole amount of the principal of the first mortgage bonds to be due and payable, and that there was due and unpaid at that time, of interest specified in the coupons, \$417,278.87, and that there was also due at that date, \$89,764.19 of interest accrued upon overdue coupons; the whole amount found due was \$1,507,043.06. The decree ordered the road to be sold subject to taxes legally due, and to all just claims for right of way, and to certain prior mortgages on small portions of the real estate, and directed the master, after making the sale, to pay certain expenses, the compensation of the trustees, and thirdly, "all such indebtedness contracted, or to be contracted, by the receiver, as may not be accepted to, at or before the confirmation of said sale," and further directed that all the residue of the money arising from the sale shall be brought into court, subject to further order. The decree further provided, that the rights of all the holders of the bonds and coupons, and of other persons having an interest in the fund, be reserved for subsequent determination; and that all such persons have the same rights against the fund arising from the sale that they would against the property sold prior. The master, under this decree, sold the railroad and property of the company, and Solon Humphreys became the purchaser for the sum of \$950,000. In the decree of foreclosure it is recited that the same was entered by the consent of the railroad company, John H. Allen, John Allen, Francis B. Cooley and James Buell, and of Humphreys, Jessup, Terry and Field.

Before the confirmation of this sale, Humphreys, Jessup, Terry and Field filed their exceptions to the payment of any and all indebtedness contracted by the receiver, except for necessary expenses in operating the road, and for supplies purchased since his appointment; and they especially objected to the payment of certain certificates under the order of the court, made May 6, 1878. After this, the sale was confirmed by order of the court.

The record shows that of the first mortgage coupons maturing on and after July 1, 1878, none were paid, and that of those maturing on and after July 1, 1871 (embracing the coupons attached to bonds 13 to 25 inclusive), a portion only have been paid, leaving \$227,278.87 unpaid. A rule was entered by the court on all the parties to show cause why distribution should not be made among holders of the bonds and coupons, and several claims of priority were interposed. Humphreys and his co-intervenors claimed that the coupons held by them should be paid in the order of their maturity, before any distribution could be legally made on the principal sums specified in the bonds. It was insisted by the holders of coupons on which nothing had been paid, where the holders of other coupons of the same series and time of maturity were paid in full, that they should be equalized, and that the amount due upon such unpaid coupons should be paid in full before any part of the fund should be distributed upon coupons maturing later, or upon the principal sums secured by the bonds.

The court ordered that all the certificates issued by the receiver, mentioned above, be first paid; and the court denied the application of coupon holders for priority of payment, and ordered that the fund, after the payment of costs and receiver's certificates, be distributed pro rata to the holders of bonds and overdue coupons, treating all such claims, whether for principal or unpaid interest, as equal in law and equity. From this decree Humphreys, Jessup, Terry and Field, and some other holders of bonds and coupons, appealed to the Appellate Court for the Second District, where the decree was affirmed. From the judgment of the Appellate Court, Humphreys, Jessup, Terry and Field alone appealed to this court, and insist: first, that coupons overdue at the time when the principal of the bonds became due are entitled to priority of payment over the principal sums mentioned in the bonds, and in the order of their maturity; and second, that holders of bonds and coupons are entitled to priority of payment out of the fund as against the holders of the receiver's certificates.

Mr. WAGER SWAYNE and Messrs. HAY, GREENE & LITTLE, for the appellants, insisted it was error to allow the issue of receiver's certificates to pay claims for labor, supplies, etc., furnished the company within a period of six months before the appointment of a receiver, and also certificates with which to pay off an indebted-

ness for borrowed money, for which John Allen was personally responsible. The order of the court below established two classes of indebtedness as a first lien against the mortgaged property, amounting to about \$150,000. The claims thus allowed a preference over the debt secured by the mortgage, were contracted years after the execution and recording of the mortgage. This displacement is not warranted by authority, and is subversive of the inviolability of contracts.

On the final hearing in chancery all interlocutory decrees are open for revision, and are under the control of the court. *Fitzhugh v. McPherson*, 9 Gill & J. 51; *Ridgley v. Bond*, 18 Md. 433; *Fanniquet v. Perkins*, 16 How. 82; *Consequa v. Fanning*, 3 Johns. Ch. 364; *Gibson v. Rees*, 50 Ill. 388.

A trustee cannot charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust. *New v. Nicoll*, 73 N. Y. 130.

The person appointed receiver was disqualified from acting, being the senior officer of the company, and its largest creditor. *Baker et al. v. Admr. of Backus*, 32 Ill. 115; *Taylor v. Oldham*, Jacobs, 527; *Kerr on Receivers*, 126-130.

The receiver's authority was limited by the order of the court under which he acted, and all persons purchasing his certificates were bound to take notice of the extent of his authority. *Bank of Montreal v. C., C. and W. R. R. Co.*, 48 Iowa, 524; *Stanton et al. v. Ala. and Chattanooga R. R. Co.* 2 Woods, C. C.

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As to the application of the earnings of a railroad to current expenses, etc., see *Fosdick v. Schall*, 9 Otto, 252.

Messrs. WILEY & NEAL, for the appellees:

The order was interlocutory only, and not subject to review in a higher court until a final decision. *Woodside et al. v. Woodside et al.* 21 Ill. 207; *Gage v. Eich*, 56 id. 297; *Racine and Miss. R. R. Co. v. Farmers' Loan and Trust Co.* 70 id. 249.

Even if the decree was erroneous, the rights of third persons acquired under it are not divested by its reversal. *McLagan v. Brown*, 11 Ill. 519; *Clark v. Pinney*, 6 Cow. 297; *Hubbell v. Brownwell*, 8 Ohio, 120; *Goudy v. Hall*, 36 Ill. 319; *Feaston v. Fleming*, 56 id. 457; *Gray v. Brignardello*, 1 Wall. 634; *Gusteau v. Wisely*, 37 Ill. 433; *Wadhams et al. v. Gay*, 73 id. 415.

As to the power of a court of equity to appoint a managing receiver of a railroad company when taken under its charge as a trust fund to pay incumbrances, and to authorize such receiver to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, see *Wallace v. Loomis*, 7 Otto, 147; *Meyer et al. v. Johnston*, 53 Ala. 237; *Stanton et al. v. Alabama and Chatta-*

nooga R. R. Co., 2 Woods, C. C.; Fosdick v. Schall, 9 Otto, 235.

The bondholders were represented by their trustees, and must be regarded as bound by their acts, so far as the interests of third persons acting upon the faith of the action of the court may be affected. Wallace v. Loomis, 7 Otto, 163; Jones on Railroad Securities, sec. 539.

Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business, shall be paid from the current receipts before he has any claim upon the income. Fosdick v. Schall, 9 Otto, 235.

MR. WHEELER H. PECKHAM, for the appellees, the Bank of New York, National Banking Association, and Union National Bank:

The petitioners have consented to the entry of the order giving the certificates priority over the bonds. Even if the consent of the trustees of the mortgage was not binding on the bondholders, it was necessary that those who repudiate it should do so promptly. Silence after knowledge is consent. Gold Mining Co. v. National Bank, 96 U. S. 640. Jones on Railroad Securities, secs. 363, 438.

A court of equity having the power to issue receiver's certificates and make them a prior lien, a purchaser of them is not bound to look into the proofs and judge their sufficiency. Should the adjudication of the court be afterwards reversed, intermediate purchasers would be protected. Lovett v. Reformed Church, 12 Barb. 67; Ebaugh v. Church, 3 E. D. Smith, 60 N. Y. Com. Pleas; Wood v. Jackson, 18 Wend. 107.

DIOKEY, J.—Whatever may be said as to the limitations which the law places upon the exercise of the power of the chancellor to make certificates issued by a receiver for moneys borrowed by him a lien upon the property, superior to the vested lien of the mortgagees, in this case we think that appellants are not in a position to raise that question. The bonds which they held they bought from Mr. Constable on the 10th of May, 1879. At that time all of these certificates had been issued and disposed of by the receiver, and were held by the parties who had paid for them in cash, or had received them in substitution of securities which they held for pre-existing debts. Whether the subject matter to which these certificates were applied comes within the scope of the powers of the court in the preservation of the property for the benefit of all concerned, was a question which might have been raised, and ought properly to have been raised, before the certificates were issued and sold. Mr. Constable, the owner of these bonds, knew, as a director in the railroad company, and by proceedings which occurred in the directors' meetings, that the road and other property of the company had been placed in the hands of a receiver. He knew that the order for the issue of certificates, to be made a first lien upon the property of the company, had

been entered of record, and that such certificates were about to be issued and put upon the market. The proceeds of a part of these certificates were to be applied in releasing from a chattel mortgage property upon which the bondholders claim to have a lien, and in which he had an interest as a stockholder. It was incumbent upon him, if he intended to insist that these certificates should not be a paramount lien upon the property of the company, that he should have intervened and raised his objections. On the contrary, with a full knowledge of all the facts, he lay by and permitted others in good faith to invest their money in these certificates, and the money to be applied for his benefit in discharging the liabilities of the company for services and supplies, and for a debt by which the rolling stock of the company in which he was interested was tied up. In a court of equity he could not be heard afterwards to claim that the holders of these certificates should not have this priority.

The appellants purchased these bonds on the 10th of May, 1789, and the circumstances show that they knew that the bonds had become over due, and that they were advised of the condition of the litigation. The very language of the contract by which they purchased shows that they knew that the road was then in the hands of a receiver, and that the conduct of the business by the receiver was not satisfactory, and hence they were authorized to take measures to have the receiver changed. Under the circumstances they occupy no better position as holders of these bonds than did Mr. Constable, whose mouth, we have seen, had been closed upon this subject by his own conduct.

The remaining question, relating to the priority claimed for holders of coupons first falling due, was disposed of, and by a majority of the court decided against the views of appellants, in the case of *Humphreys et al. v. Martin et al.* 100 Ill. 542, and need not be discussed here.

The judgment of the Appellate Court is therefore affirmed.
Judgment affirmed.

WALKER, J., dissenting.—It is seldom that a question of more importance is decided by this court than the one arising on this record, and inasmuch as I am unable to concur in the conclusion announced, and owing to the importance of the question as a precedent, I feel compelled to present some of the reasons for my dissent. In submitting them, I shall not content myself with merely criticising the views presented by the court, as it is not the opinion, but the decision, to which I dissent. All know that a decision may be strictly and accurately correct, and yet the reasons assigned in its support be fallacious. If I were able to demonstrate that the reasoning of the court is wrong, the correctness or incorrectness of the decision would remain unapproached—that

inquiry would still remain. The record presents some questions that are of first impression in this court, which I think must be determined before a correct conclusion can be reached. I shall endeavor to demonstrate that the decision of the court below is grossly erroneous.

I shall consider the questions whether the circuit court erred in borrowing the \$149,431.51 on behalf of the railroad company or the fund, and had power to pledge the fund in court for its payment; whether it could make such indebtedness a superior lien to valid, unquestioned mortgage liens that appeared of record at and before the time the court borrowed that sum; and whether the court, before the final order of distribution, should not have placed all of the first mortgage bondholders on an equality in the payment of interest.

Preliminary to the discussion of these questions, I shall refer to some of the plain, and, I think, well recognized, rules governing courts of chancery in administering such funds. The power to do so is an extraordinary one, and until a recent period has been seldom resorted to in practice. It is arbitrary, expensive, and generally resulting in heavy loss, and, not unfrequently, in ruin to the fund, and is oppressive, if not ruinous, to the parties. It may be a serious question whether its exercise has been productive of more benefit than evil; still it is a well recognized part of equity jurisdiction. It has been of comparatively rare use in the State tribunals, but of more general use in the Federal courts. A practice has obtained in those courts that may not, and perhaps should not, be adopted by the State tribunals, and certainly not if not based on equitable principles, or is not promotive of justice. A proceeding so expensive, if not oppressive, to the parties, and the exercise of the power being almost wholly discretionary, the court should never exercise it except in cases of necessity, and not then unless it is clearly necessary to preserve the fund from waste or misappropriation; nor should the power ever be exercised to enforce mere legal claims. To call the power of the court into action there should be property, or a fund, in which several have equitable claims, or liens adverse in character and conflicting in interest. In modern times the power has usually been exerted to settle squabbles between parties in business, or to settle and adjust conflicting liens on corporate property; and in its exercise, I have no doubt, the power has been the subject of much and frequent abuse. It has been perverted even to the foreclosure of a simple mortgage, by placing the mortgaged premises in the hands of a receiver, when the rents and profits would not pay such an officer his fair charges for holding and preserving the property, and this, too, when there was not the slightest reason for its exercise, because there was no danger of perversion or loss, and no conflicting equities. This is a manifest abuse of this dangerous power.

Other abuses of the power seem to have obtained. It is perhaps more liable to be used as an engine of malice, or to procure fraudulent advantages, than any other power with which the chancellor is armed, and hence it should be more guardedly used.

Experience teaches, that when a partnership, by long and assiduous effort, has established a business and character more valuable than capital, it may be ruined and rendered totally worthless by a member of the firm who, from petty jealousy or affront, invokes this extraordinary power. In such cases the entire capital of the firm is taken out of the hands of its owners, tied up in the custody of the law, lies idle for years, and its owners deprived of its use, prevented from continuing in business, and perhaps utterly ruined, and at the end of the strife, the court, too late, learns it was all prompted by spite and malice. With corporations it is believed not to be unfrequent that a portion of the directors and stockholders form designs to acquire the corporate control and property to the exclusion of the others, and resort to this proceeding to consummate their purposes. These matters are referred to as illustrating the almost certain ruin to parties, and the great danger of the courts being used as the unconscious instruments to effectuate unjustifiable schemes, and as admonishing them of the great necessity of using this discretion sparingly and with great caution.

When the court has seized the property and placed it in the hands of a receiver, it becomes the duty of the court, through that officer and by orders of the court, to use every reasonable effort for its preservation, and if on the final hearing it appears to be required, to decree its sale and reduction to money, and its speedy distribution amongst those entitled to participate in the fund. One of its highest duties is the preservation of the property from all hazard and loss, and the fund from impairment and every kind of diminution. The court having deprived the owner of its care and custody, must use all reasonable efforts for its preservation; nor has the court the power to hazard either the fund, or its title, to loss. It must be held in the same condition, as to the rights of all parties, in its various changes, from its seizure till its distribution. The court has no right to change or modify the lien of any claimant, or in any manner jeopardize his legal or equitable rights, and all know the court cannot do by indirection what it is powerless to do directly.

It is an egregious mistake to suppose that by seizing the property or fund the court or the receiver becomes its owner. The court is simply the legal custodian for its preservation and distribution, but invested with no title to, or interest in, the fund. The court, so to speak, is a mere naked bailee, charged with legal duties, but not invested with the slightest ownership of, or interest in, the property, beyond a mere right to, and the control of, its possession. All else are duties, and not rights. When the court seizes the

property of a business firm or corporation, it does not become the firm or corporation, or invested with the powers or legal rights of either—it simply becomes the legal custodian of the property. It does not necessarily have control over the partners of the firm, nor of the artificial person called a corporation; but it does become invested with the power to administer and distribute the fund, if required by the principles of equity. It then follows, that the court has no power to continue the business of the firm or corporation, or perform any act pertaining to either. If the members of the firm or the directors of the corporation have the means and the inclination, they, afterwards as before the seizure of their property, may continue their business. The firm may continue to carry out the purposes for which it was organized, and the corporate body to perform all of its corporate duties and perform its various functions.

The placing of the property or fund in the hands of a receiver is to all intents, and for all purposes, an equitable attachment; and who ever heard of a sheriff continuing the business of the defendant in an attachment or execution, after levying on his property? The law confers no such power, nor will it tolerate its exercise. Nor does the court become invested, by attaching the property, with any more power than the sheriff. The property in either case is in the hands of the law, to answer the requirements of the law, and not for corporate, manufacturing or business purposes.

From these considerations it is perfectly apparent that the court has no power to trade upon or with the property or fund in court, nor to borrow money on or pledge the fund as security for such loans, either to augment the fund or pay the debts of the owner; and the exercise of such power can find support in no rule, principle or analogy of the common law or equity jurisprudence, that I have in my researches been able to find, nor is it conferred by the statute, nor am I aware that it can rightfully come from any other source. But when actually necessary for the preservation of the property, the court has the power to order the sale of so much, and only so much, as may be required to preserve the balance. This grows out of the duty to preserve it; but if there is money as a part of the fund, or it can be collected from dues to the fund, it should be used for that purpose, and no property sold until ordered by the final decree. This is within the powers of the court. Railroad property being somewhat different in character from that of other corporations, and such corporations having been created, more largely than others, to subserve great public interests and needs, may admit of some slight exceptions to the general rule. No well founded objection is perceived to the court's permitting the receiver, in holding and preserving the property of the company, to answer the requirements of the law, to use it in operating

the road, provided it does not impair or diminish the security of the lienholders, or increase the indebtedness of the company. In fact, I am unable to perceive how the court can constitute itself an agent of the company, and bind it by contracts never authorized or assented to by the company. When thus operated, all attendant expenses should be defrayed from earnings and receipts of the road.

But precedents are quoted from the Federal courts in support of the exercise of power to so operate the road, borrow money to meet such expenses, and even to furnish supplies, make repairs, and purchase rolling stock, and to pay incidental expenses, and make them a charge against the fund. But wrongly decided cases are not law, nor should they ever become binding precedents. In *Mittan's case*, 4 Coke, 33, it is said: "*Judicandum est legibus non exemplis.*" That was then, and has always since been, a maxim of the law. What possible reason can be assigned why judgments should not be given according to the laws, rather than precedents? Precedents may or may not speak the law, but all know that it is not always true that they do. A precedent that has stood the test of time, and has never produced any but beneficial results, is strong evidence that it speaks the law; but a decision hastily and inconsiderately made by a bold judge, determined to relieve against a supposed hardship in the particular case, without reflecting where it will lead, or the consequences that must ensue if adopted as a precedent, should never bind other tribunals. But the tendency is to throw the responsibility on the past, and to shield ourselves under the decision of others, and to blindly follow such, and all others, as precedents, without the labor and reflection necessary to determine their correctness or fallacy. By this means many crude decisions get into the reports, confusion is produced, and wrongs perpetrated. Hence, it is the duty of the courts to enforce the law, and not precedents, unless they speak the law. It has been truly said: "Precedents travel to enormous lengths." They are therefore required to be restrained and confined within the limits of the law.

But if it were possible to sustain, on legal or equitable principle, the power of the court to borrow money and make it a charge against the owner of the property, or a lien on the fund, it is impossible for me to see that it can, under any circumstances, or for any purpose, authorize the court to postpone legal, valid, unimpeachable liens on the fund, to secure the payment of debts that are not prior liens, or even liens at all, on the fund. How can it be that the court may arbitrarily override and trample upon vested rights, the obligation of contracts, and all of the safeguards the law has for ages built up and thrown around such rights? Ever since the organization of our government it has been supposed that when a person, in strict conformity to all the requirements of ex-

isting laws, obtains a right to property, or a lien upon it, there was no power in the State, its departments or functionaries, to deprive him of it, or to impair its force, or postpone it to subsequently acquired rights, without his consent, or some fault or omission of duty on his part. But here no one denies that appellants have such a lien, or claims they have omitted any duty, and yet their lien against the fund is postponed to the extent of \$149,431.51 of debts created years after they acquired their lien.

Nor can this power, by any pretence, be legally exercised under the claim that this large sum was borrowed to be used for the preservation of the fund. That is contradicted by all of the evidence in the case. Under the circumstances of this case, it is a perversion, even an abuse, of terms, to claim this large sum was borrowed or used for such a purpose. It was borrowed to pay debts incurred by the company long subsequent to the mortgage liens, which debts were in nowise liens on this fund. This is the precise case, when stripped of all immaterial and extraneous circumstances. The debts incurred in nowise contributed to the preservation of the fund. It but relieved the company, and not the fund, of indebtedness. All know the receiver could have safely held the property, and could have been paid for his labor, care, and necessary expenses in doing so, out of the proceeds arising from its sale. It seems to be a mere fiction to hold this large sum was raised to preserve the property, and had its preservation been necessary there was not the slightest occasion to borrow the money.

Would not all men have been profoundly astonished had the circuit court decreed that the master in chancery should levy upon and sell a sufficient amount of the property of appellants to raise \$149,431.51, and to apply it in payment of the debts that were discharged by the court? And in principle and law where is there a difference? Appellants were in nowise liable for the debts, and these were certainly, if any lien on the fund, in no sense superior, or to be preferred to theirs, unless it was the taxes on the property in the custody of the court. Then why should the court appropriate \$149,431.51 of the fund on which they had a first lien, and deprive, or rather take from them, that many dollars to pay those debts? In what does or can it differ in principle from seizing one man's property to pay another man's debts, for which he is not in the slightest degree liable? It cannot be denied that the court below took from the fund to which appellants, according to every known rule or principle of justice, were entitled, and paid it to creditors who had no claim to or interest in the fund or money thus taken. Appellants had no better or higher title to the money in their pockets than to their lien on this fund. No kind of sophistry or false reasoning can overcome this proposition.

It, however, may be said that when a railroad is thus placed in

the hands of a receiver great public interests are involved. This is no doubt true. And it is also urged that it behooves the court to devise some means to protect those great interests. It surely cannot be the duty of the courts to despoil private individuals of hundreds of thousands of dollars of their fortunes to protect the public interest and convenience. It would seem to be far juster that the public, rather than appellants, should pay for the protection of such interests. Appellants only owe a common duty to the public, and if, as good citizens, they discharge that duty, the public has no further claim on them. Then why take from them \$149,431.51, and bestow it on the public? There is nothing to show they have done any act that worked a forfeiture of this large sum of money, and if there was, this is not a proceeding for the purpose of enforcing it, or in which it could be declared and enforced. If there be the supposed great public inconvenience, let the public provide for it by appropriate legislation, and even constitutional amendment, if needful, but let the courts refrain from visiting the consequences and the great burden on a few private individuals.

For these and other reasons I might adduce, I am unalterably convinced the circuit court was utterly powerless to borrow a dollar of money, or to pledge the fund for its payment, or to create any lien, and that it was absolutely without the semblance of power to divest appellants of their vested rights to their prior lien, and to do so was to destroy such rights, and to impair the obligation of a contract as valid and as solemnly entered into as any known to the law, and as fully entitled to legal protection as any right known to it.

I shall now consider whether the circuit court erred in making distribution of the fund. No objection is perceived to paying the costs out of the general fund. Such is the general practice in administering such funds.

Had the court possessed the power to create a lien, and had the decree made these sums a first lien on the personal property embraced in the chattel mortgage, then it might have been contended, under the authority of the cases of *Gregg v. Sanford*, 24 Ill. 17, *Titus v. Mabee*, 25 id. 257, and *Hunt v. Bullock*, 23 id. 320, that the deeds of trust were not executed, acknowledged, registered and recorded in conformity to the Chattel Mortgage law, and were void as a chattel mortgage, and therefore never became a lien on the personal property; or it might have been claimed and shown that none of the personal property was in existence when the deeds of trust were given, and under the authority of 1 *Parsons on Contracts*, 437, and *Robinson v. McDowell*, 5 *Maule & Selw.* 228, the trust deeds did not attach to or become a lien on after-created or purchased personalty; but, on the contrary, the decree declares the sums thus borrowed under its requirement, a

lien on all of the property, and to be preferred to all other liens. Nor in the final order of distribution does the decree require these debts incurred by the court to be confined in their payment to the proceeds of the personal property. Had it done so, it is probable appellants would have had no right to complain, as they had, under these authorities, no lien on the personal property. Nor will I here stop to inquire whether appellants did not have, as lien creditors, an equal right to participate with the general creditors, including the holders of the second mortgage bonds, in the proceeds of the sale of the personal property, as there are other and abundant grounds for a reversal.

It may be said that there is nothing to show that there were not ample means arising from the sale of the personal property to pay these debts. We cannot know that such proceeds amounted to more, if so much, as \$1000. The court below should have, through the receiver, ascertained the amount for which it did sell, and have confined the participation of these debts to that fund alone, if it is possible to hold that they should be paid. In this there was clear and manifest error.

It is urged that appellants are estopped to deny that this \$149,431.51 loan, under the order of the court, is not a lien preferred to that of the two mortgages. The first ground of estoppel claimed is, that the trustees named in these mortgages were parties to the suit, and consented that this new indebtedness might become a preferred lien to that of the trust deeds, and that they should be postponed. The law is familiar, well settled, and I believe has never been questioned, that a trustee can never bind his cestui que trust by any act not within the scope of his authority. He is powerless to permit waste, or to destroy the trust property or fund, or to impair its title. Here the deeds of trust cannot be so tortured as to confer a particle of power on the trustees to release or postpone the lien of the trust deeds to junior claims to those of the bondholders. Their power was to receive the money due the bondholders, or, in default of payment, to sell the property and pay over the money, and their duty required them to preserve the fund and lien of their cestuis que trust. So far from having power to bind the bondholders, they were acting without authority, and in flagrant violation of their duty, and it would be monstrous injustice to hold the bondholders bound by their unauthorized act, performed in violation of their plain duty. It is true, they were the trustees for the bondholders, but the trust deeds conferred no such power, and the deeds were on record, and notice to all persons dealing with the trust fund. Had the parties making these loans under the decree of court examined the records, they would have found the trust deeds had become liens years before, and the trustees had no power, at any time, for any purpose, or for any amount, to postpone these liens. The fact this was a fund in

court, notified all persons that there were liens on the fund, otherwise the court could not have had the fund in its custody. Having such notice, those who loaned their money on this fund were guilty of gross negligence in failing to learn the nature and extent of the liens before parting with their money.

It is next urged, that as the trustees were made parties to the suit, the bondholders should be considered as parties, and bound as though they had been in court. The position is certainly novel, especially where we find the trustees, instead of protecting the rights of the bondholders, endeavoring to release and depreciate their security. This case strongly illustrates the necessity of having the beneficiaries before the court, when their interests are involved. Here the trustees endeavored to release to others over \$149,000 of the fund pledged to pay a debt of more than double the value of the fund thus pledged. This demonstrates the wisdom of the law requiring all parties in interest to be before the court.

It is urged that the directors of the company, by resolution, authorized the \$81,600 to be borrowed, and the personal property of the company to be mortgaged to secure its payment, and the bondholders are thereby estopped and it thereby became a preferred lien to those of the trust deeds. How, it may be asked, can a mortgagor, by executing a second mortgage, and consenting or agreeing with the second mortgagee, to give him a preferred lien to that of the first mortgagee, possibly change the rights of the first mortgagee? Would not its maintenance violate the simplest principles of the law, and every dictate of reason and plainest requirements of common justice? If any of the directors were bondholders, to the extent of their interest it would amount to a waiver of their first lien on the property embraced in the chattel mortgage; but by no rule of which I am aware could it be held to release or postpone their lien on other property, nor could it affect the lien of any other bondholder. Allen swears that at that meeting three-fourths of the bondholders were represented. The expression is indefinite, as he does not explain in what manner they were represented. But even suppose the directors then present held three-fourths of the bonds, that could not, in the slightest degree, affect the rights of the holders of the other fourth. To so hold would violate all known rules of law. The action of the board at that meeting did not impair or postpone the lien of holders of the fourth of the bonds not represented, or any property to which their lien had attached; but by the decree of the circuit court it was held it did, and in this there was gross and palpable error. All that can be justly claimed for that resolution is, that it postponed the lien of the bondholders then present, but only on the property embraced in the chattel mortgage, and nothing more, as already seen; but the circuit court held that it postponed the

mortgage liens on all of the property. In this part of the decree there was gross error.

But it is said that appellants purchased their bonds *pendente lite*, and after the order for receiver's certificates to issue had been made, and they took in precisely the same condition Constable, from whom they purchased, held the bonds. This is no doubt true; but how did Constable hold the bonds? The court had made an order to borrow money without authority. It had, without authority, decreed such certificates should be a preferred lien to the first and second mortgage bonds. Nor did, as we have seen, the trustees, by betraying their trust, have any power to consent that the liens of the first and second mortgages should be postponed. This decree was reversible when, under our practice, it could be presented for review; and Constable not being a party to that decree, was not bound by it, and he not being bound, appellants could not be by purchasing of him. In this there is nothing that bears the remotest resemblance to an estoppel.

But counsel say Constable was a director, and owned the bonds now held by appellants, and voted to borrow the \$81,600, and mortgage the personal property of the road to secure its payment; that he thereby postponed the lien of these bonds to that of the chattel mortgage, and appellants having afterwards purchased the bonds of him, took them with the same estoppel that prevented Constable from claiming these bonds were a prior lien to the chattel mortgage. To this proposition there are several conclusive answers: First, these bonds were not due, and there is no evidence that appellants had the slightest information that such a resolution was adopted by the directors, hence they were not bound by the resolution.

Again, the resolution cannot, by any ingenuity, be tortured into anything more than a release of the lien of these bonds on the personal property to the extent of the sum of \$81,600. As well say, a man, having a mortgage on two tracts of land, who releases or postpones his mortgage lien on one tract in favor of a junior lien, releases or postpones his lien on both tracts. The only possible effect of Constable's vote in favor of the resolution was to postpone any lien he held by his bonds on the personal property, but on nothing else. It is impossible to see how he, by voting for that resolution, could be held to have consented that the court should borrow \$67,831.51 more, and make it a preferred lien on all of the property over all prior liens, or by what process of reasoning it can be said that his vote could postpone the lien of the bondholders under the second mortgage. Yet the decree does make both of these sums a preferred lien to all others, and ordered them to be first paid. Moreover, the decree authorizing the loan on the certificates was not supported by law, and was erroneous, and it cannot be held that he, by that vote, intended to release all errors in all decrees that

might be rendered in any suit that might thereafter be brought in reference to the mortgaged property; and if he had not released such errors, on what pretence can it be held appellants have released the error?

Again, complaint is made that to give appellants their just and legal rights will work great hardship on the holders of these certificates, especially as they relied on the decree of the court to give them a first lien. They were loaning money on property which was then under two liens, as solemnly created as can be done by the forms of the law. These mortgages were on record, and they are conclusively presumed to have known the fact and all they contained, and they are presumed to have known the law, and if so, they must be held to have known that it did not sanction the decree, and that it was reversible. The negligence, then, was theirs, and not that of Constable and appellants. The court has no power to deprive parties of their just, legal and equitable rights, and confer them on others merely to relieve against hardships. To do so would abolish the administration of justice according to law.

But conceding that the court had the power to direct the receiver to issue certificates, and borrow this money to relieve the personal property from the chattel mortgage and other liens, and to pay debts, etc., it was manifest error not to have confined the payment of the certificates exclusively to that property and its proceeds. But I hold the court had no power to order the borrowing of money, or to make it a lien on this or any other property. I further hold courts are not, nor can the law permit them to become, money changers, and borrow and loan money, buy and sell commercial paper, and transact a general brokerage business. It may be said this is not of that character of business. If the court may borrow money because it conceives it to be for the interest of the parties litigant, why not, for the same supposed reason, loan their money for profit, buy their paper, or that of other parties, at a discount, thus advancing their interest, and thus take its litigants under its paternal care? If it may borrow money, it is but a short step to all of the other acts, and they can be justified on precisely the same grounds and for the same reasons. Far better leave it to the legislature, in whose province the power is found, to afford a remedy, if needed. The courts are not invested with such corrective legislative power.

If it be urged that appellants should have resisted the decree of the court requiring the receiver to borrow the money and issue his certificates, it may be asked how they could resist, as they were not parties when the decree was passed, nor does it appear they had the slightest notice of the proceeding. Then, on what principle hold them estopped from asserting their rights? It has generally been understood that a man cannot be estopped unless he is fully informed of the facts, and assents, or fails to protect his

rights to the injury of others ; and the never-questioned doctrine is, that no person can be bound by a judgment or decree unless he is a party to the proceeding, and has opportunity to assert his rights, or he claims in privity with one who has had such opportunity. If appellants must be held estopped because they failed to appear and resist the order, under the circumstances of this case, it must be upon some rule of which I have no knowledge, nor can such a rule be shown. Shall we deliberately hold that a person having a lien on, or having an interest in, property or a fund, shall be deprived of his unquestioned and unassailable rights in it because he fails to appear and defend them when involved in a suit to which he is not a party, and this, too, when he has been guilty of no wrong, or the omission of any duty? Is it possible to maintain such a doctrine without overturning principles that have not been questioned for ages, or perhaps are so simple and eminently just that they never were questioned? No rule ever announced requires a person having such a lien to seek all persons and inform them of the fact. The recording law does that for him.

Again, in making distribution the circuit court refused to first satisfy unpaid coupons for interest, when other coupons of the same series had been paid, and thus equalize all bondholders in the amount of interest received, before making the general distribution. In cases of this character equality is equity. A portion of the bondholders had received payment of installments of interest, when others had received no interest on these installments. In this manner some of the bondholders received more than a pro rata share of the fund. Each bondholder had an equal right in equity to share in the fund. The fund was inadequate to pay the full amount of the first mortgage bonds, and no principle of equity is clearer than in such a case all have equal equities, and are entitled on its distribution to share in it pro rata. As the fund was distributed, a part of the bondholders received of the fund more than their proportionate share, and this was manifest error. The trust was created to secure all of the bondholders of the same class alike, and each one had an equal lien on the same fund to secure his bonds and interest, and when the fund proved insufficient to pay all, it is incomprehensible how one portion of the bondholders, having no superior equities, should receive of the fund more than their pro rata share in the distribution.

I have, I think, shown that beyond all doubt the decree of the circuit court was manifestly erroneous, and should be reversed. Were not my convictions so thorough that this decision is wrong, I should not have troubled the profession with these hastily constructed views, and had my official duties permitted, I should have given more thought and reflection, and presented other reasons, for my dissent ; but the importance of the questions seemed to call for my adverse views before the case becomes a precedent.

See note, p. 82.

JAMES R. LANGDON and Others

v.

THE VERMONT AND CANADA R. R. Co. and Others.

(53 *Vermont Reports*, 228. *October Term*, 1881.)

The Vermont and Canada R. R. Co. in 1849-50 leased its railroad to the Vermont Central R. R. Co., at an annual rental of eight per centum on the cost of its construction, with a provision that, in case the rent should remain four months in arrear and unpaid, the lessor should have the right to enter upon both roads, and run the same until all rent due and growing due, while it was so in possession, should be paid by the net income. The Vermont Central Co. subsequently executed two mortgages of its roads and property, subject to said contracts of lease, to trustees, to secure first and second mortgage bonds; and surrendered possession of both roads to the trustees of the first mortgage. While they were in possession of and running the roads, default was made in the payment of rent to the Vermont and Canada Co. The Vermont and Canada Co. then brought its bill in equity, praying for a decree for the rent then due, and to be put in possession of both roads according to the terms of the contracts of lease, or else, "that the court would appoint some suitable person or persons to be the receiver or receivers, and manager or managers of said roads and property." The contracts of lease were held valid and binding by this court; the property was placed in the hands of receivers to carry out the provisions of the same; and the cause was ordered to be continued on the docket of the Court of Chancery, open to all parties thereto for further orders. Subsequently, by decrees of the said court, upon notice to, and the assent of all parties, the first and second mortgage bondholders of the Vermont Central R. R. Co. were authorized to elect annually, at meetings duly called for that purpose, a committee, consisting of two first and one second mortgage bondholder, who should advise with the receivers and managers concerning their management of the property, and audit their accounts. The bondholders elected and kept in office such a committee. The receivers and managers continued to act as such in the management of the property, and under and by the authority of various decrees of the Court of Chancery, entered by consent of the parties—the Vermont and Canada Co., and the bondholders' committee, having full notice thereof, and assenting, or failing to object thereto—issued various loans to a large amount for the purchase of equipment, and other additions to, or improvements upon, the property; securing the same upon certain equipment and the car service thereof; and negotiated said loans as receivers and managers; of all which the Vermont and Canada Co. and the bondholders' committee had notice.

The question being as to the equitable priority of right to payment from the income, or corpus, of the property, as between the holders of the loans, so issued by the receivers and managers, on the one hand, and the Vermont and Canada R. R. Co. and the first and second mortgage bondholders on the other; and it being claimed that the specific purpose for which the receivers were appointed having been accomplished before the issuance of said loans, although the receivers had never been discharged, they were not, at the time of the issue and negotiation of said loans, strict receivers, so that said loans do not constitute receivers' debts, or affect the rights of the Vermont and Canada R. R. Co., and the first and second mortgage bondholders, to the priority of payment and security. *Held*,

1. When receivers have executed the duty for which they were appointed, it is the right and duty of the party upon whose application they were ap-

pointed to see to it that they are discharged, if he would avoid the consequences of their continuing to act in that capacity.

2. When persons act as receivers and managers, and issue negotiable obligations, as such, with the knowledge and assent of all the parties interested in the subject matter of the receivership, as against bona fide holders of such obligations, such parties are estopped to deny that they are just what they purport to be, namely, the obligations of receivers and managers, and as such, entitled to priority of payment from the assets of the trust.

3. It is immaterial whether they were strict receivers or not. Purchasers of the bonds, or securities, issued by them, relied upon their apparent authority, as such; and when one of two innocent parties must suffer, he shall suffer who by his own acts occasioned the confidence and the loss; he who gave the power or opportunity to do the act must bear the burden of the consequences.

4. The first and second mortgage bondholders of the Vermont and Canada R. R. Co. having elected to avail themselves of an authority given for their benefit, and at public meetings chosen a committee to represent them in matters appertaining to the management of the property, are all bound by the acts of said committee, within the scope of its authority. The issuing of loans by the receivers and managers, as such, for the benefit and conservation of the property, was a matter within the scope of its authority to advise with the receivers and managers about, and assent to.

5. The Vermont and Canada R. R. Co. and the first and second mortgage bondholders of the Vermont Central R. R. Co., through their committee, having full knowledge of the acts of the receivers and managers, in issuing negotiable obligations, as such, and acquiescing therein, and receiving some portion of the avails thereof, are estopped from denying that said acts are as binding upon them as the acts of strict receivers would have been; hence, as between the bona fide holders of the bonds so issued by the receivers and managers, and the Vermont and Canada R. R. Co., with its claim for rent, and the first and second mortgage bondholders of the Vermont Central R. R. Co., with their claim for interest, the former have the superior equity and must be first paid.

6. Taking a special security is not of itself a waiver of all other security. This generally depends on the understanding of the parties when the security is given.

7. A bill will not be dismissed for multifariousness, where the questions presented for adjudication by it, or some of them, are questions in which all the orators have a common interest, and where none of the defendants are embarrassed in making their defence, by the alleged misjoinder of parties or causes of action. Story Eq. Pl. s. 278-9 and n.

THE cause entitled the Vermont and Canada R. R. Co. v. The Vermont Central R. R. Co. et al., was entered in the Franklin County Court of Chancery, at the June term, 1855, and by order of court is still pending.

The history of that cause sufficiently appears in the opinion. The bill in the present suit is brought in the nature of a bill of supplement to the original bill in that cause and all amendments and supplements thereto, and all petitions, decrees, orders and proceedings in said cause, making all such previous proceedings a part thereof. It is brought in the name and behalf of the Central Vermont R. R. Co., James R. Langdon and certain other owners of the various classes of bonds issued under the decrees mentioned in

the opinion, who are therein named, and all other holders of such bonds. The Vermont and Canada and Vermont Central R. R. Cos., the trustees of the first and second mortgages of the Vermont Central R. R., the advisory committee of the first and second mortgage bondholders, and certain of the holders of the first and second mortgage bonds, are made defendants.

The bill, after setting out the previous proceedings in the cause of the Vermont and Canada R. R. Co. v. The Vermont Central R. R. Co. et al.—from which it appears that the receivers and managers, from time to time in possession of the property, were, by various decrees and orders of the Court of Chancery, authorized to issue, and did issue and dispose of, their notes or bonds known as “funded” or “trust” loans, for the purchase of equipment, and for the other purposes set forth in said orders and decrees, and to pledge, as security therefor, certain specific property—and the appointment of the Central Vermont R. R. Co. as receiver and manager in that cause, on the 21st day of June, 1873, alleges that at the time said Central Vermont R. R. Co. was so appointed, there was a large floating debt outstanding against the trust, incurred by the former receivers and managers in the operation and management of the property, which said Central Vermont R. R. Co. was obliged to pay, and did pay, out of its own funds, for the purpose of running and operating the road, and that without the payment of said money said roads could not have been run and operated; that the money so advanced is still due to the orator the Central Vermont R. R. Co., and constitutes a proper debt from the trust, or trust property. That there is now a large floating debt, contracted for money borrowed for the current business of operating said railroads, and the purchase of material and supplies, and that all the debts contracted by the orator the Central Vermont R. R. Co., and the former receivers and managers, whether funded or floating, were contracted in good faith. That all said trust debts were incurred with the consent, under the authority or with the acquiescence of the Vermont and Canada and Vermont Central R. R. Cos., and the first and second mortgage bondholders of the latter company, or legitimately grew out of contracts to which they assented, or in which they acquiesced. That all persons interested in said roads, whether as stockholders or bondholders, are firmly and legally bound by all the orders and decrees made in regard to said property or its management by the receivers and managers in the former cause, whether said orders and decrees were strictly judicial or not—that they bind all parties in interest as fully as if they were, and no party in interest can now be heard to claim that he was ignorant of them, or that he is not bound by them. It insists that said funded and floating debts are in equity a first lien upon said roads and property, or if not, then upon the earnings and income thereof, and are entitled to be paid

in priority to the rental claims of the Vermont and Canada R. R. Co., and the claims of the first and second mortgage bondholders; and as to the funded loan notes secured upon specific property, that the holders, after exhausting the special security pledged, are entitled to have the balance due paid out of the earnings of the roads and property in preference and priority to the claims of the Vermont and Canada and Vermont Central R. R. Cos., and the first and second mortgage bondholders. That the orator, the Central Vermont R. R. Co., when it accepted the office of receiver and manager, was advised and believed that the money advanced by it, as above stated, would be a lien upon said roads and property; and the same is declared in the order appointing it, and it would not have accepted said office had it believed otherwise. That the other orators have parted with their money upon the obligations of the receivers and managers in the same belief; that a large part of the value of the roads and property consists of improvements made with their money, and that nearly all the equipment and furniture of the roads was paid for with money obtained by the outstanding funded and floating loans. That the orators, some of them, represent every class of the holders of debts incurred by the receivers and managers, and can and will represent their interests fairly; and though the interest of each is separate and distinct, their rights to have an application of the trust property or its earnings stand upon the same ground, both in fact and law; that the number of persons holding such claims is so large as to make separate suits by each impossible, and to save a multiplicity of suits, the orators pray that any person or persons holding such claims may be allowed to become parties to the bill, and that the claims of all may be ascertained so that all may have equal benefit of such relief as may be found and held appropriate. The orators pray that the accounts of the Central Vermont R. R. Co., as receiver and manager since the 1st day of July, 1873, may be adjusted, and the amount due it ascertained; that the holders of notes secured by a pledge of specific property may have the amount of such security ascertained and appropriated to their payment, and that after the application of such security the balance due, together with the funded and floating debt, may be decreed to be a first lien and charge upon said roads and property, and the income thereof, prior in right to any claim of the Vermont and Canada R. R. Co., or the bondholders under the first and second mortgages of the Vermont Central R. R.; that some time be fixed for the payment of said claims; and, in default, that the property be sold to pay them; or, if the court should not order a sale, that the roads and property be ordered to remain in the hands and possession of the Central Vermont R. R. Co., or some other person or party, to run and operate the same, and apply the income thereof to the payment of such claims.

The answers of the trustees under the first and second mortgages of the Vermont Central R. R. admit that they believe the facts set forth in the bill are true, and that the orators are entitled to the relief therein prayed for, but that some of the bondholders think otherwise, and desire that all the bondholders should find all the protection to their rights that the facts in the case will warrant.

The joint and several answer of Judith W. Andrews, Francis A. Brooks and Edward D. Mandell admits all the allegations in the bill down to and including the decree of 1861, and that said decree was legal and binding. It admits the making of all the decrees and orders set out in the bill subsequent to the decree of 1861; but denies that they were legal decrees or orders, and claims that they had no binding force or effect except in so far as they have been ratified or assented to by the parties to be affected by them. That the receivers in possession, pending the litigation that resulted in the decree of 1861, were continued in possession for the purpose of working out the execution of said decree and the satisfaction of the rent in arrear and coming due to the Vermont and Canada R. R. Co., and for no other purpose. That the decree was fully executed and all arrears of rent to the Vermont and Canada R. R. Co. paid in 1864, and that the possession of the persons before that time receivers, was, after that, not as receivers of the Court of Chancery, but by virtue of the agreement of the Vermont and Canada R. R. Co. and certain persons claiming to be a committee of the first and second mortgage bondholders. That the provisions in the decrees of 1864 and 1866, for the appointment of an advisory committee were wholly void and conferred no authority whatever upon said committee. That the decrees of 1864 and 1866 were not, in nature or character, supplemental, and could not have been lawfully entered in said cause as supplemental therein. Denies that all the holders of the first and second mortgage bonds assented to or ratified the decree of 1866. Admits that an advisory committee was elected under the decree of 1864, who attended to the duty of auditing the accounts of the receivers, but denies that any such committee has been elected since 1871. Denies that the chancellor had jurisdiction of the petition in the matter of the appointment of the Central Vermont R. R. Co. as receiver and manager, and claims that said company has not any just or lawful possession of, or authority over said roads, by virtue of the order of the chancellor upon said petition. Admits the existence of a large floating debt which had been contracted by the so-called receivers and managers previous to June 21st, 1873; but denies that it was incurred in the operation and management of the Vermont Central and Vermont and Canada R. Rs., or either of them, and insists that it was incurred in hiring and operating other railroads and

steamboat lines. Neither admits nor denies that the Central Vermont R. R. Co. advanced \$1,000,000 to liquidate debts of former managers; but denies that it was under any obligation so to do, and claims that the floating debts which the central Vermont R. R. Co. may have paid were without any security in the hands of the former holders, and that that company stands in no better position in regard to the same than those to whom said debts were due and owing when paid.

The same matters of defence, substantially, are alleged in the separate answers of Francis A. Brooks and of the Vermont and Canada R. R. Co.—the latter company insisting that it has, at all times, been entitled to its rent out of the gross income of the property; that its claim is in equity superior to the claims of all other creditors, and that it has never assented to, ratified or acquiesced in any arrangement, order or decree by which its claim was waived or postponed.

It is claimed generally by the answers, by the cross-bill filed by Judith W. Andrews, Edward D. Mandell and Francis A. Brooks, by the plea of Judith W. Andrews and the demurrers of the Vermont and Canada R. R. Co., Edward D. Mandell and Francis A. Brooks, that the Central Vermont R. R. Co., for reasons stated, is incapacitated from bringing and maintaining the bill; also, that the bill is multifarious.

Many other matters are alleged in the answers, cross-bill and plea, by way of defence, which were not regarded by the court as material to the disposition of the questions presented by the bill.

An answer to the cross-bill was filed, and replications to the various answers and demurrers, and testimony was taken by the orators in support of the bill.

The cause came on for hearing at the September Term, 1878, of the Franklin County Court of Chancery, to wit on the 4th day of January, 1879; whereupon it was ordered by the chancellor that the bill be dismissed, pro forma, and without prejudice, and an appeal was granted to the next term of the Supreme Court for Franklin County, whence it was ordered for argument before the full bench at the General Term, at Montpelier, in October, 1879.

The cause was heard before the full bench, and was argued by the following named counsel: For the orators—Luke P. Poland and B. F. Fifield; for the Vermont and Canada R. R. Co.—Aldace F. Walker and Edward J. Phelps; for certain first and second mortgage bondholders of the Vermont Central R. R. Co.—Francis A. Brooks, Esq.; for certain holders of equipment and income and extension bonds—James C. Barrett, Esq.; for himself, as holder of Vermont and Canada guaranteed bonds—briefly, Robert Codman. A brief in behalf of certain equipment bondholders was presented by E. R. Hard.

The cause was held for advisement until December 14th, 1880, when the opinion of the court was delivered by

ROYCE, J.—The principal object and purpose of the bill is, that the amount due the different classes of claimants described in it should be ascertained, and also the order in which they should be paid, the security to which each is entitled, and the mode and manner in which the property that is the subject-matter of the litigation shall be appropriated for their payment. It is insisted by the demurrers, plea, cross-bill and answers of the defendants, upon the grounds therein alleged, that the bill is multifarious. The questions presented by it for adjudication, or some of them, are questions in which all of the orators have a common interest, and to avoid a multiplicity of suits it is allowable that all should join in a proceeding instituted for the purpose of having it ascertained what that interest is. The defendants, all and each, are entitled to make all and any defence that they might make, collectively or separately, if bills had been brought by each orator against all or each of the defendants; so that the defendants are in no wise embarrassed in making their defence by the alleged misjoinder of the parties or causes of action. No possible advantage could be gained by compelling each of the parties interested in the subject-matter of this controversy to bring separate bills. What constitutes multifariousness has been much discussed by chancellors and elementary writers, but no rule of universal application seems to have been established. Courts, in considering the question, have regarded the convenience of the parties, as shown by the case, and whether their equitable rights could be properly protected rather than rules and precedents. *Story Eq. Pl.*, ss. 278–9, and n.

The authorities relied upon by the defendants are not in conflict with what has been stated. It is also claimed that although the special leave of the Court of Chancery was obtained to bring this bill in the nature of a bill of supplement to the original bill, the relief sought therein is not supplemental and cannot be granted. This objection is technical, and relates to the form of procedure. The reasons given by the court in *Vermont and Canada R. R. Co. v. Vermont Central R. R. Co. et al.*, 50 Vt. 500, in sustaining the right to proceed by petition in the original cause, are, in our judgment, equally applicable to the manner of proceeding here, and are a full and complete answer to the objection. The bill, then, not being demurrable for multifariousness, or as having been brought in the nature of a bill of supplement, we are brought to the consideration of the case as shown by the pleadings and proofs. In order to fully understand it, and thus be enabled to intelligently apply to it the principles of equity law, it becomes necessary to give a detailed history of the prop-

erty in litigation, extending over a period of nearly thirty years, as shown by the records of the court, the action of the corporations and their officers and stockholders, the trustees, advisory committee and the receivers and managers.

In 1843 the Legislature of Vermont passed an act to incorporate the Vermont Central R. R. Co., and granted to said company the right to build a railroad from some point on the eastern shore of Lake Champlain to some point on the Connecticut River. The act incorporating the Vermont and Canada R. R. Co., was passed in 1845, and granted to said company the right to build a railroad from some point in Highgate, on the Canada line, to some point or points in Chittenden County most convenient for meeting, at the village of Burlington, railroads to be built by the Champlain and Connecticut River R. R. Co. and the Vermont Central R. R. Co. It was provided by the second section of the said act that if the company should not complete the road within thirteen years, the corporation should cease and the act become void. In 1849 the act was amended, extending the time within which said company was required to build its road to make said connections at the village of Burlington, to eighteen years from the 31st day of October, 1845. On the 24th day of August, 1849, the Vermont and Canada R. R. Co. and the Vermont Central R. R. Co. entered into a contract, under seal, in and by which the Vermont and Canada R. R. Co. agreed to provide the funds and construct its railroad within such time, on such location and in such way and manner as should be conformable to its charter, and to lease the same as it was or might be located and constructed, with all the fixtures and property pertaining to the same, to the Vermont Central R. R. Co., its successors and assigns, until the Vermont Central R. R. Co. should purchase the same, or the State of Vermont should purchase the same, under the sixteenth section of the charter of said company, with the right to use and occupy the same as fully and freely as it might or could do under its charter, and any additions made or to be made thereto. And the Vermont and Canada R. R. Co. covenanted that it would, at all times, continue and preserve its legal organization, and hold such meetings and pass such votes, appoint such officers and confer upon them such powers, keep such records of its proceedings and make such reports to the Legislature, or otherwise, as may be required by law. And the Vermont Central R. R. Co., on its part, agreed that when the Vermont and Canada R. R. and its appurtenances should be constructed in manner aforesaid, and ready for use, it would provide the necessary power and other equipment and operate and run the same, at all suitable times thereafter, for the accommodation of the public, and pay as rent therefore, in addition to the necessary incidental expenses of said Vermont and Canada R. R.

Co., a sum equal to eight per cent. annually upon the amount of the whole cost, for the time being, of said road, its buildings, fixtures, lands and appurtenances, as the same shall have been paid by the Vermont and Canada R. R. Co.; the rent to begin on the 1st day of December then next, and to be thereafter paid semi-annually, on the first days of June and December in each year.

It will be observed that the only security that the Vermont and Canada R. R. Co. obtained for the payment of the stipulated rent by this contract was the undertaking of the Vermont Central R. R. Co. to pay it, and such as the law would accord to it as lessor; and that the rent to be paid was not made dependent upon the earnings or income of the property.

On the 9th day of July, 1850, the aforesaid parties made another contract, under seal, materially modifying the previous contract, as far as the security for the rent to become due to the Vermont and Canada R. R. Co. was concerned, and as defining how the security agreed upon was to be made available. It was provided by that contract that if the rent reserved to the Vermont and Canada R. R. Co. should be and remain in arrear and unpaid for the space of four months after the same should be payable, it should be lawful for the Vermont and Canada R. R. Co. to enter, or take possession of, and use and run, not only the said Vermont and Canada R. R., but also the Vermont Central R. R., with all the property of each of said companies then owned and enjoyed by them, and used in connection with or for the purpose of running or working each of said railroads, and having thus entered, to receive all tolls, fares and other lawful income receivable from the use of said roads, and after paying therefrom all reasonable expenses of running and working said railroads and of making all such repairs of each of said railroads, or any buildings or structures connected therewith or used therefor, and also the cost of all such engines, cars and other furniture as may be found necessary, to apply the residue of its said receipts in and towards the payment of all rent then in arrear and unpaid; and that when the rent in arrear should be paid in full by means of the net receipts aforesaid, or by the Vermont Central R. R. Co., the Vermont Central R. R. Co. should have the right to resume the possession of said railroads, with the same rights and subject to the same duties as before such entry by the Vermont and Canada R. R. Co.; and the Vermont and Canada R. R. Co. reserved its right to resort to an action at law to recover any rent in arrear if it should choose so to do. The Vermont and Canada R. R. was so far completed that the Vermont Central R. R. Co. took possession of, and run and operated it under the contract of August 24th, 1849, and paid the rent reserved up to the 1st day of June, 1854.

On the 30th day of October, 1851, the Vermont Central R. R. Co. executed a deed of trust and mortgage of its railroad and franchise, stations, engine-houses, shops, wood-houses, iron, sleepers and other appendages, with all the lands thereto belonging and intended for the use and accommodation of the said road, all the locomotive engines, passenger, freight, dirt, hand and other cars, and all the other personal property belonging to said company, as the same was then in use by said company, or as the same might thereafter be changed or renewed by said company, subject to all the rights and privileges which the Vermont and Canada R. R. Co. had in and to said granted premises as contained in the several indentures between the Vermont Central R. R. Co. and the Vermont and Canada R. R. Co., dated August 24th, 1849, and July 9th, 1850, to three trustees, to secure the notes or other obligations of said company for the amount of two millions of dollars. Said notes or obligations were to bear date the 1st day of November, 1851, and be payable on the 1st day of November, 1861, with interest at seven per cent, payable semi-annually, with a provision that if there should be a default in the payment of interest or principal for the space of ten days, then said trustees, or their successors, might, if they should see fit, take possession of the property conveyed by said deed, and manage and control the same, and after providing for the expenses incident to working the road and to keeping it in a condition suitable for business, to apply the net proceeds to purposes of the trust.

On the 30th day of May, 1852, the Vermont Central R. R. Co. executed a second deed of trust and mortgage of the same property described in the first deed of trust and mortgage, subject to said prior mortgage and to the rights and privileges of the Vermont and Canada R. R. Co. to three other trustees, to secure the notes or bonds of said company to the amount of one million five hundred thousand dollars; said bonds or notes to bear date the 1st day of July, 1852, and be payable on the first day of July, 1867, with interest at seven per cent, payable semi-annually.

On the 28th day of June, 1852, the Vermont Central R. R. Co. surrendered and delivered possession to the trustees named in said first deed of trust and mortgage, as such trustees, all the property, rights, privileges and franchises conveyed to them by said deed, and all the rights and title which said Vermont Central R. R. Co. had to run and use the Vermont and Canada Railroad; and receive the tolls thereof; to have and to hold all of said property in conformity to the provisions of said mortgage, and for the uses and purposes mentioned in the same, and no other. Said trustees took possession of the roads and property described in said deed of surrender, and used and occupied the same. And while they were so in possession, default having been made in the payment of the rent reserved to the Vermont and Canada R. R. Co., which became due

and payable on the 1st day of December, 1854, the Vermont and Canada R. R. Co. brought a bill in equity returnable to the June Term, 1855, of the Franklin County Court of Chancery, against the said trustees, the trustees of the second mortgage, various bondholders under both of said mortgages, and other persons having, or supposed to have an interest in the subject matter of the litigation; and set forth in said bill the contracts executed between the Vermont and Canada R. R. Co. and the Vermont Central R. R. Co., and alleged that the Vermont and Canada R. R. Co. had done and performed all which was required of it by said contracts; also the deed of surrender by the Vermont Central R. R. Co. to the trustees under the first mortgage, the fact that said trustees were in possession, and that the rent due to the Vermont and Canada Company on the 1st day of December, 1854, was due and unpaid. The orator in said bill prayed that the Vermont Central R. R. Co., and said trustees, be ordered and decreed to pay the rent due on the 1st day of December, 1854, and in the meantime that they be allowed to enter and take possession of said roads and other property, and receive all tolls, fares and other lawful income receivable from the same, and after the payment of all necessary expenses, to apply the residue of such receipts towards the payment of all rent then due, or which might become due while they might remain in possession of said roads; or else, if it should not seem fit to the court to make such order, then that the court would appoint some suitable person, or persons, to be the receiver, or receivers, and the manager, or managers, of said roads and property then in the possession of said trustees, subject to such orders, directions, conditions, limitations and terms as the court should deem proper and necessary to secure the rights of the orator and all others interested in the same; and that they might have such other and further relief in the premises as justice and equity might require. The defendants appeared and filed answers to the bill.

On the 17th day of May, 1855, the chancellor made an order dispossessing said trustees and putting the Vermont and Canada Company in possession of its road and the Vermont Central road and all of the personal property in the possession of said trustees and used by them in connection with said roads. The Vermont and Canada Company was required by said order to assume and pay all the liabilities of the trustees incurred in the execution of their trust, and indemnify and save them harmless against all loss, damage, cost or expense by reason of such debts or liabilities, and to pay to them all sums advanced in the execution of said trust beyond the trust fund received by them.

On the 6th day of May, 1856, the chancellor made an order restoring to the trustees of the first mortgage—who were John Smith, John S. Eldridge and Lawrence Brainerd—the possession of both of said railroads and all the property acquired by the Ver-

mont and Canada Company, under the order of May 17th, 1855. Said trustees were ordered to hold, manage and dispose of said property and account therefor at all times, under and subject to the order of the court, and after expending from the proceeds of the earnings thereof the necessary expenses for running, operating and keeping in repair the same, and such sums as may be necessary for the purchase of new stock and equipment, and such liabilities as the former trustees and the Vermont and Canada R. R. Co. are now under in respect of their former proper management thereof, to hold the residue of the earnings and profits subject to the order of the court. They were also required to give a bond for the faithful discharge of their duties. They were charged with all the duties and liabilities of receivers, and although not designated as such in the order, they were considered and treated by the court and the parties to the cause as receivers, or receivers and managers. This is evident from the order of the chancellor made December 6th, 1856, in which he says that said trustees were appointed receivers and managers of said railroads, property and effects, on the 6th of May last, and orders them to file an inventory of the property and effects received by them of the Vermont and Canada R. R. Co.

On the 6th day of December, 1857, the chancellor appointed John G. Smith manager and receiver in the place of John Smith, deceased; and on the 25th day of March, 1859, appointed Joseph Clark receiver and manager, in place of George M. Dexter, who, it seems from the order, had been a trustee of the first mortgage, and receiver, and had resigned. In a notice signed by Lucius B. Peck, as solicitor and president of the Vermont and Canada R. R. Co., dated April 24th, 1860, requiring the defendants in the cause to appear and show cause why the prayer of the petitioner, filed in the cause, should not be granted, Lawrence Brainerd, Joseph Clark and John Smith were named as receivers and managers of the Vermont and Canada and Vermont Central Railroads. Numerous other orders were made by the chancellor during the pendency of the cause, but as they have no connection with or relation to the subject matters now in controversy, no allusion is made to them.

The cause was finally heard at the January Term, 1861, of the Supreme Court, and remanded to the Court of Chancery with a mandate to enter a decree for the orator; and that the contracts entered into between the Vermont and Canada R. R. Co. and the Vermont Central R. R. Co., on the 24th day of August, 1849, and the 9th day of July, 1850, were valid and binding; and that the Vermont and Canada R. R. Co. was entitled to have the tolls and income of the said roads directed to, and applied to the payment of the rent due and growing due under said lease, for the use of said road. In pursuance of said mandate a final decree was signed by the chancellor on the 13th day of July, 1861, in which it was

ordered and decreed that the possession, management and control of both of said railroads and railroad property should be continued in the then receivers, subject to the order and direction of the court, with power of removal at all times; that the receivers' accounts should be settled and the money then in their hands, and which might come into their hands, derived from the income of said roads, be paid to the Vermont and Canada R. R. Co. until the amounts due and growing due to the Vermont and Canada R. R. Co., and the costs of the suit, should be paid and satisfied. The reasons and grounds for that decision and mandate are clearly and fully stated in the opinion, drawn up by Judge BARRETT, in the 34th Vt. 2.

On the 11th day of November, 1863, the Vermont and Canada R. R. Co. filed a petition, addressed to the Court of Chancery of Franklin County, setting forth the previous proceedings in the cause, and that the rents provided for therein were largely increased by the cost of further construction of the petitioner's road, so that the computation for rent provided for in the lease and deed of security, was increased from \$1,348,500 to about \$1,700,000, and that still further large sums for costs of construction were in course of expenditure; that there was then due to the petitioner for rent in arrear, about \$950,000; that the net income of the roads and property was insufficient, and would be for many years, to pay accruing rents and rents in arrear; that the whole or principal part of the first mortgage bonds were due and unpaid; that the Vermont Central R. R. Co. was insolvent and had no means with which to pay, except net income; that disastrous litigation existed; that the petitioners' stock and the bonds had depreciated in value, and that to settle all matters in controversy, and to increase the value of both the stock and bonds, they, and a very large proportion of the holders of the first mortgage bonds, acting by their agents and attorneys, O. W. Davis, Joseph Andrews and Otis Drury, had entered into an agreement which provided:

First,—That the capital stock of the Vermont and Canada R. R. Co. should be at once increased to two million dollars, and on such increase dividends should be payable, commencing on the 1st day of April, 1863.

Second,—That the sum of \$71,800 should be paid by the trustees of the first mortgage to the Vermont and Canada R. R. Co., at such time as the trustees might be able to do so without delaying the construction of the road from Swanton to Canada line.

Third,—That the road from Swanton to Canada line was to be built without delay from the funds in the hands of the receivers and trustees, and as expenditure should be made therefor, stock of the Vermont and Canada R. R. Co. was to be issued to the holders of the first mortgage bonds, as they might determine to receive the same, either by subscription or in payment of interest.

coupons, with a proviso that the stock so to be issued should not exceed \$250,000.

Said agreement was made subject to the approval of the stockholders of the Vermont and Canada R. R. Co., and on condition that such a decree should be obtained in a suit then pending—the bill for that purpose to be amended if necessary—as should render the adjustment legal and binding on all parties interested in both of said roads, that such legislation should be obtained as would render said agreement legal, and that, if ratified and carried out, it should be in full discharge and settlement of all claims in favor of either class of bondholders against the Vermont and Canada R. R. Co., and of all matters of dispute between said parties. The agreement also provided for the settlement and payment of the incidental expenses of the Vermont and Canada R. R. Co. out of the trust funds; that all suits and actions against the Vermont and Canada R. R. Co. and the trustees of the first mortgage should be discontinued, and the costs of all suits pending and the expenses of the committee of the first mortgage bondholders should be paid out of the trust fund. The petition further alleged that the parties represented by said agreement were desirous that it should be carried into full and final execution; that the Legislature of the State, by an act approved November 4th, 1863, had authorized the Vermont and Canada R. R. Co. to convert its back rent into stock and to increase its capital stock for that purpose, on such terms as the Court of Chancery, having jurisdiction in the cause then pending in Franklin County, should deem just and equitable, for the purpose of carrying said adjustment into effect; and that proceedings might be had under the power and authority conferred by the act by a petition in said cause, by any party thereto, without the dilatory and formal proceedings usual in cases of bills and other pleadings in equity. The stockholders of the Vermont and Canada R. R. Co., at a meeting called for that purpose, on the 1st day of October, 1863, approved and adopted said contract of settlement, with certain unimportant modifications, and at a meeting appointed for the 5th day of November, 1863, adopted a resolution that, “with the view and for the purpose of enabling this company to carry out the compromise made with the committee of the first mortgage bondholders and the Vermont Central R. R. Co., the act of the Legislature of Vermont, approved November 4th, 1863, is hereby accepted.”

At a term of the Court of Chancery, holden on the 19th day of January, 1864, it appearing that the order of notice made by the chancellor had been complied with, the petition came on for hearing. The Vermont and Canada R. R. Co., Vermont Central R. R. Co., Brainerd, Clark and Smith (the then receivers), and Silas Pierce, a bondholder, appeared by their respective solicitors, and O. W. Davis, Joseph Andrews, Otis Drury, Geo. M.

Dexter and Estes Howe appeared in person; and no objection being made to the granting of the prayer of the petition, and it appearing that the matters stated in the petition were true, and that carrying the adjustment set forth in the petition into effect would be just and equitable to all parties interested in said roads and property, it was ordered and decreed that the Vermont and Canada R. R. Co. might increase its capital stock to such an amount that its capital stock should be two million dollars, and that that sum should be the basis for the computation of the rent provided for in the original lease, except as hereinafter provided; that said rent should be chargeable upon the whole property and income of said roads, and that said rent should be paid by the trustees and receivers from time to time in possession of said roads and property, and from the income thereof, so far as the same can be earned; that the incidental expenses of the Vermont and Canada R. R. Co., the costs and expenses in suits which were ordered to be discontinued, the reasonable charges and expenses of the committee of the first mortgage bondholders, and the future services and expenses of the advisory committee should be paid by the trustees and receivers; that the trustees and receivers should, within three years from the 1st day of June, 1864, pay the Vermont and Canada R. R. Co. the sum of \$97,000, with interest from said 1st day of June, and that the Vermont and Canada R. R. Co. should not demand or receive any further or other sum, for or on account of any rent or interest in the premises, then due or outstanding in its favor, prior to June 1st, 1864, or for any incidental expenses prior to June 1st, 1863. That additional stock might be issued by the Vermont and Canada Co. if it should be required, to pay the expense of constructing any road that it was, or should be, by law compelled to build, and that said stock should stand the same as the stock previously issued; that O. W. Davis, Joseph Andrews and Otis Drury, the then committee of the first mortgage bondholders, and their successors as such committee, who should be appointed annually by such bondholders, at a public meeting called upon reasonable notice for that purpose, should constitute an advisory board, in respect to the management of said roads and property, with a right to advise the trustees and receivers in respect thereto, and with a right to inspect the books, papers and accounts of the trustees and receivers. And said committee were constituted the auditors of the accounts of the trustees and receivers, and if they should approve of the same, they were to be allowed to pass without further proceedings; but if they should not approve of any part, the usual reference was to be made for examination and decision by the court; that the trustees should annually print and distribute to all the first mortgage bondholders, whose names and residence should be known to them, a report of the earnings and expenditures of said business,

with a statement of its affairs and prospects in general for the year preceding such report; that all suits pending (except one in Chittenden County Court of Chancery) respecting said roads and property, either against the Vermont and Canada Co. or the trustees and receivers, should be discontinued; that the trustees of the second mortgage, the Vermont Central R. R. Co. and Vermont and Canada R. R. Co., should have the right at all times to object to any part of the accounts of the trustees and receivers before the same were passed upon by the court. That the cause in which the petition was filed should be continued on the docket of the Court of Chancery, and that any party in said cause should be at liberty to apply to the court from time to time for further orders in the premises, as they might be advised.

On the 20th day of February, 1866, the trustees of the first and second mortgages, and certain bondholders under both mortgages, brought a bill of complaint against the Vermont and Canada R. R. Co., Vermont Central R. R. Co. and a large number of the bondholders under both mortgages, returnable to the April term, 1866, of the Franklin County Court of Chancery, setting forth that the trustees of both mortgages and a committee of the two classes of bondholders had entered into an agreement to settle and adjust certain doubts and difficulties as to the rights of the two classes of bondholders and as between each other, and praying that the provisions of that agreement might be decreed to be enforced and carried into execution. Service of the bill was made upon the Vermont and Canada R. R. Co. and the Vermont Central R. R. Co., and an order of notice was made as to the other defendants. The bill was returned to the aforesaid term of the Court of Chancery, and it appearing that the order of notice had been complied with, and none of the defendants appearing or making any answer to the bill, it was ordered and decreed that the bill be taken as confessed as to each and all of them. A decree was drawn up and signed on the 14th day of April, 1866. The decree provided for the issuing of new coupons and bonds in substitution for those first issued, extending the time of payment of both classes of bonds, and fixed the time of payment. It expressly recognized the prior and paramount rights of the Vermont and Canada R. R. Co., as provided for in its lease, and the instruments in addition thereto, and in the decrees of the Court of Chancery theretofore rendered in this cause, which were to be recognized and preserved inviolate, and it directed as to payments to be made to the first and second mortgage bondholders out of the trust funds, after paying all sums which the Vermont and Canada R. R. Co. should be entitled to. It further provided that the advisory board, provided for in the decree of January 19th, 1864, should thereafter, and until otherwise ordered, be constituted of two first mortgage bondholders and one second mortgage bondholder.

On the 4th day of August, 1865, the receivers filed a petition in the original cause, setting forth the gross income and expenses of said roads and property for the years 1864 and 1865, the necessity for further improvements in the property and the purchase of cars and engines, and setting forth why said improvements were required and such additional cars and engines needed; at what points the improvements should be made, the kind and character of such improvements, and the number and kind of engines required; that they had no funds with which to pay for such improvements and equipment, that the accruing and expected earnings of the property, over expenses, would not, for a very considerable time, be sufficient to provide for such improvements and equipment, and that the use of the same for such purposes would necessarily require the suspension of the payment of dividends and interest provided for in the decrees before made and secured on said roads and property. The petition prayed that the court would, upon due notice to the parties, and upon hearing, order and direct that for the uses set forth in the petition the sum of \$700,000 might be raised and obtained by them, in such manner, for such time, at such rate of interest and under such provisions as to the securing, paying, liquidating, funding or capitalizing the same, or any part or class thereof, as to the court should seem meet, and that such further order and direction might be made as to the court should seem fit. The petition was presented to the chancellor at chambers on the 10th day of August, 1865. Notice was ordered by the chancellor to be given to the Vermont and Canada R. R. Co., the Vermont Central R. R. Co., the committee of the first mortgage bondholders and the trustees of the second mortgage and committee of the second mortgage bondholders, by delivering a copy, with the order of the chancellor, to each, and that the petition should stand for hearing on the 31st day of August, 1865. The hearing was continued to the 7th day of September, at which time, it appearing that the order of notice had been complied with, and the Vermont and Canada R. R. Co. having appeared by its solicitor and a majority of its directors, and the Vermont Central R. R. Co. by its solicitor, and J. M. Pinkerton and W. C. Smith in person, and R. F. Taylor and others by a communication in writing, from E. J. Phelps, their solicitor, having informed the court that they do not object to the granting of the prayer of the petition, and the receivers having appeared in person and by their solicitor, and proofs having been heard in support of the petition, and counsel having been heard thereon, and it having then been made manifest to the court that the matters stated and set forth in the petition were true, it was ordered and directed that the receivers be authorized to borrow such sums, not exceeding in the whole \$700,000, as should in their judgment be necessary for the uses and purposes set forth in the petition. And in order to raise said

money, if practicable, without embarrassing or suspending the payment of rents, dividends or interest named in the decrees before passed in the cause, it was ordered and directed that the receivers and managers be authorized and empowered, as such, to issue and dispose of their promissory notes for such sums and on such time, or times, not exceeding ten years from the date thereof, at such rate of interest, not exceeding eight per cent free from income tax, and payable at such places and times as they might judge expedient, and specially to pledge and secure a lien upon the engines and cars which had been added to the equipment of the line since January 1st, 1864, with all the cars and engines to be purchased with the funds so raised, for the ultimate payment of said notes and interest; and to set aside from year to year as a fund, wherewith primarily to meet and liquidate said interest and principal, as the same should become due, the car service (so called) of all said engines and cars so pledged for the security of said notes and interest. And that the sum so set aside should be used to pay off the interest as it might accrue, and the balance to constitute a sinking fund wherewith to pay off and extinguish said loan and notes when due, with leave to the receivers and managers to use said sinking fund in the purchase of said notes before due, or to invest the same in public securities. And if the interest or principal of said notes should not be paid when due, the holders were given liberty to apply to the court for relief by the enforcement and realization of said securities. And in case the receivers and managers should not be able to raise money in the manner indicated, they were authorized to make such temporary loans as might be needful, on the credit of the funds and assets of said receivership and management, and to repay the same out of any earnings accrued or to accrue from the business of the line.

On the 15th day of April, 1867, the receivers, as such, and as trustees of the second mortgage, filed a second petition in the cause, setting forth that the erection of depots and machine shops under the direction of the court, had, by the unexpected increase of cost of material and the price of labor, increased the expenditure therefor by quite a large amount. That they found the interests of the roads and property in their management made it absolutely necessary for them to obtain control and management of a branch road running easterly from St. Johns, Canada, called the Stanstead, Shefford and Chambly R. R., and that this could only be done by purchasing the stock of said road, and the bonds secured by a mortgage thereon, which required an expenditure of about \$364,000. Also that the necessity of such purchase was assented to and approved by all parties interested in said trust; that they had been compelled to expend the income and earnings of the property for other purposes necessary to its safety and protection, and that as a result of all such expenditure, they were then under

liabilities for the trust of about \$753,302.98. That on the 1st day of June, 1867, the \$97,000 ordered by the decree of 1864 to be paid to the Vermont and Canada R.R. Co., would become due and payable, with interest; that the dividends to the Vermont and Canada R. R. stockholders, and the interest on the first and second mortgage bonds, would become due at the same time, and that the interest on the equipment loan, authorized by the decree of 1865, would become due on the 1st day of May, 1867—making a total of liabilities due, or to fall due by said 1st day of June, of \$1,142,802.98. That most of the expensive erections, and the new road built, were upon the Vermont and Canada R. R., and had added materially to its cost and value. That for the purpose of providing means to meet said existing and maturing liabilities, they and the authorized representatives, agents and committees of all the different interests in the said trust property, had agreed upon a plan which provided that the stock of the said Vermont and Canada R. R. Co. should be increased \$250,000, to be used to pay the sums then due the Vermont and Canada R. R. Co., and the dividends to fall due June 1st, 1867, and the balance to be used by the managers in liquidation of the claims against the trust. That the managers be authorized to issue obligations or notes with coupons attached, payable semi-annually at seven per cent interest, to run twenty years from date, secured by a pledge of the stock and mortgage bonds of said Stanstead, Shefford and Chambly R. R. Co., the first and second mortgage bondholders to accept the said notes in payment of the interest due on said bonds on the first days of June and December, 1867, and the second mortgage bondholders to take \$150,000 of said notes, and pay the managers in cash for them; the balance of said notes to be used by the managers for the liquidation of debts against the trust; and that the managers be authorized to issue \$300,000 of notes in addition to those issued by them under the decree of the court, known as the "equipment loan," and upon the same general terms and conditions, to be secured by the stock of said road; and praying that a decree be made confirming said agreement. An order of notice was made by the chancellor, and the petition stood for hearing on the 1st day of May, 1867, at which time, it appearing that the order of notice had been complied with, and the trustees of the second mortgage, and the persons constituting the advisory board of the first and second mortgage bondholders, the parties named in the said order and petition, having duly appeared, and one stockholder in the Vermont and Canada R. R. Co., and a holder of part of the equipment loan having appeared by counsel, and upon proof produced in support of the petition, the court found and adjudged that all the facts set forth in the petition were true; and it having been proved that at a duly notified meeting of the stockholders of the Vermont and Canada R. R. Co. it was voted that the stock of the company be

increased \$250,000, it was adjudged and decreed that the stock of the Vermont and Canada R. R. Co. be increased \$250,000, said stock to be delivered to the receivers and managers to deliver to said Vermont and Canada R. R. Co. enough of said stock to pay the \$97,000 which was ordered to be paid to it by the decree of 1864, with interest, and to pay with said stock the dividends due the Vermont and Canada R. R. stockholders on the 1st of June, 1867, and the proceeds of the balance of the stock to be appropriated by them to the payment of the liabilities against the trust; said increase of stock to be in full for all expenses and payments for construction and erections upon or for said Vermont and Canada R. R. to that time; and that nothing therein contained should be construed as impairing the right of the Vermont and Canada R. R. Co. to its right of priority of payment from the income and earnings of said roads, as established by former decrees. That the managers be authorized to issue obligations or notes to run twenty years from date, with interest at the rate of seven per cent, payable semi-annually, for the sum of \$500,000, to be secured by a pledge of the stock and mortgage bonds of the Stanstead, Shefford and Chambly R. R. Co., and all of the net earnings of said road, the receivers and managers to hold and retain in their hands as a security for the accruing interest on said notes, and the payment of the principal, when due, all on the said stock and bonds and the net earnings and income on said road, to be strictly kept apart for the payment of said interest and notes; the holders of the first and second mortgage bonds to accept said notes in payment for the interest falling due on said bonds on the first days of June and December, 1867, the second mortgage bondholders to take \$150,000 of said notes and pay the managers cash for the same, and the balance of said notes to be used by the managers for the liquidation of debts against the trust; and to issue the further sum of \$300,000 in notes, at a rate of not exceeding eight per cent interest, to run not exceeding ten years from the date thereof, in addition to those issued by them under a former decree of the court, made September 7th, 1865, and known as the "equipment loan," and upon the same general terms and conditions, to be secured by a pledge of the engines and cars pledged by that decree, and certain engines and cars that had been added to the equipment since September 7th, 1865, and the same provision for setting aside the car service as a sinking fund as was contained in that decree; the avails of such notes to be applied by the receivers and managers to the extinguishment of liabilities against the trust.

At a meeting of the directors of the Vermont and Canada R. R. Co., holden on the 11th day of April, 1867, the following preamble and resolutions were passed:

WHEREAS, The committee of the first and second mortgage bondholders of the Vermont Central R. R. Co. have this day communi-

cated, through its president, a proposition looking to the funding of the entire floating indebtedness upon the property, and to the regular continuance of the payment of rents upon the Vermont and Canada R. R. stock, and the interest upon the several classes of bonds, and as a part of said plan proposing that this company should increase their capital stock \$250,000 in consequence of increased length of road and permanent improvements to the property of this company. It is therefore voted that the directors hereby signify their approval of the proposition submitted, and that a meeting of the stockholders of this company be notified to be held on the evening of the 22d inst., to consider and act upon the proposed increase of capital stock. That this company will join with the parties in interest in a petition to the Court of Chancery of Vermont, for such order and proceedings as will secure the end contemplated in said proposition, and that the clerk call a special meeting of the stockholders, to be held on the 22d day of April, 1867, at 8 P.M.

A meeting of said stockholders was called and held agreeably to said vote, at which it was voted to increase the capital stock of said company \$250,000.

On the 16th of August, 1867, the receivers and managers, as such, and as trustees of the first mortgage, filed a petition in the cause, praying, for certain reasons stated, that Lawrence Brainerd and Joseph Clark, two of said receivers and managers, might have leave to resign and be discharged, and that their accounts as such might be settled and passed, and that B. P. Cheney and R. F. Taylor might be appointed. Also that the said Brainerd and Clark and J. Gregory Smith, trustees of the first mortgage, and their successors, be and constitute, with said Smith, Cheney and Taylor, receivers and managers, a board of management (any three of whom shall be a quorum), with power to make all needful rules and regulations for the management of the property, and to run, manage and operate the same under the decrees, orders and limitations before made in the cause. On the 16th of August, 1867, this petition was presented to the chancellor, and he, having found that notice thereof had been given to the proper parties in said cause, and no one objecting thereto, and the matters stated therein appearing to be true, directed an order and decree in substantial accordance with the prayer of the petition.

On the 18th day of May, 1868, a petition was filed in the cause by Brainerd, Clark, Smith, Cheney and Taylor, representing that Smith, Brainerd and Clark were trustees of the first mortgage, that Smith, Cheney and Taylor were receivers, and that they, with said trustees, constituted a board of management of said railroads—setting forth that they, and a committee of directors of the Vermont and Canada R. R. Co. and of the first and second mortgage bondholders, and certain holders of the equipment loan, had

entered into an agreement for the modification of the decrees, before made, in the provisions made by them in relation to a sinking fund, and giving authority to the trustees and managers to extend the time of payment of the notes or bonds before that time given, by the giving by them of new notes or bonds with the same liens and securities and at the same rate of interest, and praying that said agreement might be ratified and confirmed, and the two former decrees so far modified as to conform to the same. An order of notice was made and the petition set for hearing on the 22d day of May, 1868, at which time, it appearing that the order had been complied with, and the Vermont Central R. R. Co. appearing by its president, and the Vermont and Canada R. R. Co. and the other parties to said agreement appearing by their solicitors, and it appearing that the facts set forth in said petition were true, it was ordered and decreed that the articles of agreement are hereby ratified and confirmed, and the decrees of September 7th, 1864, and May 1st, 1867, are hereby modified. The car service mentioned in said decrees was limited and defined, and after deducting from such service the accruing interest and the expense of keeping such cars and locomotives in repair, if, in the judgment of the trustees and managers, the interest of the roads should require it, they were authorized to invest the remainder in additional equipment; but if such remainder should in any year be less than \$50,000, it was to be made up from the funds of the road to that sum. The additional equipment so to be obtained to be and remain a security to the notes issued under said decrees; and authority was given to the trustees and managers to extend the time of payment of the notes or bonds, as prayed for.

At a term of the Court of Chancery, holden at St. Albans, in the County of Franklin, on the second Tuesday of April, 1869, the trustees and managers preferred a third petition to said Court, setting forth that they had been compelled to make large and necessary expenditures in repairing the bridge at Rouses Point, and enlarging the docks at Burlington, and in putting new and additional equipment on to said roads, and that farther equipment must be immediately added; that they had consulted with the Vermont and Canada R. R. directors and the committee of the first and second mortgage bondholders and many other persons interested in the trust, and that they all concurred in thinking that they should be authorized to borrow money to pay said indebtedness and to provide said equipment, and praying that they might be authorized to borrow \$500,000 and thereafter another \$500,000, if said committee should concur with them in thinking the interest of the trust required it. The petition came on for hearing at said term, and it appearing that the directors of the Vermont and Canada R. R. Co., at a meeting held on the 9th day of April, 1869, voted to assent to a further issue of equipment bonds, not exceeding



\$1,000,000, and the committee of the first and second mortgage bondholders appearing by their solicitor and making no objection to the prayer of the petition, and several other persons largely interested in the trust property, and the Vermont Central R. R. Co. and the petitioners appearing by their solicitors and making no objection to the prayer of the petition, and it appearing that the debt against the trust ought to be paid and new and additional equipment procured, the court, on the 13th day of April, 1869, ordered that the receivers and managers be authorized and empowered to borrow immediately \$500,000, and in order to raise said money, to issue and dispose of their promissory notes on such time not exceeding twenty years, and at a rate not exceeding eight per cent interest, and to pledge as a security for the same, certain equipment and the car service of said equipment, such car service to be set aside and used, first, to pay off such interest as it becomes due; second, to pay the expense of keeping such equipment in repair; the balance to be set aside as a sinking fund, with the right to invest it in additional equipment, as provided in the decree of May 22, 1868, with the right to raise \$500,000 more in the same manner, if, in their judgment and that of the committee of the first and second mortgage bondholders, it should be deemed advisable, and to pledge as security for the same certain other equipment and the car service of the same, provided for as a sinking fund. Said committee and said receivers and managers, on the 28th day of October, 1869, executed an instrument in writing of that date, in which, after referring to said decree, they say:—

“Whereas, it was further provided in said decree that one half of said bonds might be immediately issued, and the other half whenever, in the judgment of the said managers and of the committee of the first and second mortgage bondholders, the interest of said road might require; now, we, after due consideration of the premises and interests of all concerned, do assent to the issue of the balance of said loan in bonds like those previously issued.”

On the 1st day of March, 1870, the chancellor made an order accepting the resignation of R. F. Taylor as receiver and manager, and discharged him from said office.

On the 1st day of May, 1871, the trustees and managers filed a petition in the cause, setting forth that they had made large expenditures in the construction of the Burlington and Swanton branches of the Vermont and Canada R. R. and that there remained due from the Vermont and Canada R. R. Co., on account of such expenditures, \$500,000, which was not represented by any stock of said company. That they had made large expenditures in improving the Vermont and Canada and Vermont Central R. Rs., and in procuring additional equipment, and as the result, there was outstanding a floating debt against them of \$1,500,000, and that it was important that the debt should be funded or paid;

and praying that the Vermont and Canada R. R. Co. issue additional stock to the amount of \$500,000 and deliver the same to them, and that they be authorized to issue their notes for \$1,000,000, payable in twenty years, with interest at eight per cent, payable semi-annually, the Vermont and Canada R. R. Co. to endorse and guarantee said notes, and that they be empowered to indemnify the Vermont and Canada R. R. Co. against its endorsement and guarantee. The petition came on for hearing on the 17th day of May, 1871, and, it appearing that the Vermont and Canada Co. by its stockholders' vote, had voted to issue its additional stock and endorse and guarantee the notes of the trustees and managers in accordance with the proposition contained in the petition, that the Vermont Central R. R. Co. had, by stockholders' vote, approved of and assented to the said proposition, and both companies appearing by their solicitors, and assenting that the prayer of the petition be granted, and the committee of the first and second mortgage bondholders appearing and assenting to the same, and it appearing that the facts stated in the petition were true, it was, on said day, ordered and decreed that the Vermont and Canada R. R. Co. issue its additional stock to the amount of \$500,000, and deliver the same to said trustees and managers on account of the expenditures made by them in the construction of said branches, the expenditure so made by them to be a part of the cost of the construction of the Vermont and Canada R. R., and the stock representing such expenditure to be entitled to dividends and the same priority of right as the outstanding stock; and the trustees and managers were authorized to issue their notes to the amount of \$1,000,000 payable in twenty years from date, at eight per cent semi-annually, and to indemnify the Vermont and Canada R. R. Co. against its endorsement and guarantee of said notes by a proper contract, stipulating, among other things, that on their failure so to do, the Vermont and Canada R. R. Co. should have the right to apply for a summary order, on petition for relief in this cause, to protect it against such liability, and for such appropriation of the earnings of the road as to the Court should seem equitable. At a stockholders' meeting of the Vermont and Canada R. R. Co., holden on the 16th day of May, 1871, it was voted to increase the stock of the Vermont and Canada R. R. Co., and endorse and guarantee the notes of the trustees and managers as authorized by said decree, and the treasurer of the company was authorized to execute said endorsement and guarantee, and for that purpose to use the seal of the company; and John Porter, the vice-president of the company, was requested to see to the execution of the contract provided for by said decree, and accept the same on behalf of the company. At directors' meeting of said company, holden on the 24th day of October, 1871, the said Porter, having procured such a contract signed by the trustees and managers and approved by Otis Drury, for the first

and second mortgage bondholders, submitted said contract and it was adopted and ordered to be recorded in the books of the company.

On the 15th day of April, 1872, the trustees and managers filed a petition in the cause setting forth that the loan of \$700,000, issued by them on the 1st of November, 1865, would fall due on the 1st day of November, 1875, and that provision should be made for its payment; that there was then outstanding against them a large debt in the form of a temporary loan, which had been increased by the necessary purchase of property upon the lines of railroads leased by them, which leases had been sanctioned by the court, and that further equipment was required; and praying that they might be authorized to issue their notes for an amount not exceeding \$2,500,000 for the purpose of retiring said loan of \$700,000, and for the other purposes named in the petition. An order of notice was made, and the petition ordered to stand for hearing on the 20th day of April, 1872, at which time, it appearing that the order of notice had been complied with, and the Vermont and Canada and Vermont Central R. R. Cos. appearing, by their presidents, and two of the committee of the first and second mortgage bondholders having, by their certificates attached to said petition, assented to the granting of the prayer thereof, that said temporary loan was necessary, and that more equipment was required, and generally that the prayer of the petition ought to be granted, it was ordered and decreed that the trustees and managers be authorized to issue their notes for an amount not exceeding \$2,500,000, payable in not exceeding thirty years from date, with interest not exceeding eight per cent, payable semi-annually, for the purpose of retiring the notes embraced in the \$700,000 loan issued November 1st, 1865, and for the other purposes stated in the petition, and to pledge as security for the same the engines and cars covered by the decree of September 7th, 1865, with a provision that as fast as any portion of the \$700,000 loan should be retired with funds or notes authorized by this decree, the holders of notes issued under this decree shall succeed and be subrogated to the same lien and security upon said engines and cars as is possessed by the holders of the notes embraced in said \$700,000 loan; and that the notes issued should constitute a lien and charge upon the trust property and the earnings thereof.

There was issued and negotiated, under the decree of September 7th, 1866, \$700,000 of bonds, and \$680,900 of those were exchanged for the bonds authorized to be issued under the decree of April 20th, 1872.

Under the decree of May 1st, 1867, \$300,000.

Under the decree of May 1st, 1867 (S., S. and C. R. R. loan), \$444,400.

Under the decree of April 13th, 1869, \$1,000,000.

Under the decree of May 17th, 1871, \$904,000.

Under the decree of April 20th, 1872, \$1,008,600, besides the \$680,900 exchanged for the bonds issued under the decree of September 7th, 1866. Said bonds are all outstanding, and default was made in the payment of interest on them November 1st, 1876.

On the 11th day of February, 1870, at a meeting of the directors of the Vermont and Canada R. R. Co., a committee was appointed and invested with the full powers of the corporation, to negotiate, in conjunction with the trustees and managers of the Vermont Central and Vermont and Canada R. R. Cos., any and all contracts or business arrangements with any connecting railroads that in their judgment might be for the best interest of that company, or of the line of road of which the Vermont and Canada R. R. formed a part, and to negotiate and arrange with said trustees and managers to carry out and perform said contracts in behalf of said company.

On the 24th day of February, 1870, the committee so appointed and the trustees and managers entered into a contract with the Ogdensburg and Lake Champlain R. R. Co., by which the Vermont and Canada R. R. Co. and the trustees and managers, in consideration of certain rent by them agreed to be paid to the Ogdensburg and Lake Champlain R. R. Co., acquired the right to the possession, use and control of said road and all its property and franchises for the term of twenty years from the 1st day of March, 1870, and said committee, at a meeting of the directors of said company, holden on the 18th day of May, 1870, were constituted a committee to obtain from said trustees and managers an agreement absolving said company from all liability in so far as their names may have been used in the leasing of the Ogdensburg and Lake Champlain Railroad; and at a meeting of said directors, holden on the 20th day of October, 1870, the action of said committee in entering into said contract and the contract of indemnity obtained by them from the trustees and managers, was approved.

On the 30th day of December, 1870, the trustees and managers took a lease of the Rutland Railroad for the term of twenty years, commencing on the first day of January, 1871, and at a meeting of the directors of the Vermont and Canada R. R. Co., holden on the 5th day of January, 1871, it was resolved that the action of the trustees and managers in entering into said contract, is hereby approved, and the assent of this company is hereby given for the approval of the same by the court. And on the 23d day of January, 1871, the trustees of the two mortgages of the Rutland Railroad gave their assent in writing to said contract, or lease, but without affecting the mortgage of its personal property.

On the 28th day of November, 1870, the trustees and managers took a lease of the Missisquoi Railroad for the term of twenty years, commencing from the time when said road should be completed.

On the 24th day of February, 1871, the trustees and managers,

in conjunction with the Nashua and Lowell, the Boston and Lowell and the Northern R. R. Cos., entered into a contract with the Northern Transportation Co. of Ohio, by which they agreed to aid said transportation company in maintaining a line of boats for the transportation of passengers and freight to and from Ogdensburg.

On the 26th day of February, 1870, the trustees and managers filed their petition in the cause, praying that the court would approve, ratify and confirm their action, in entering into such contract with the Ogdensburg and Lake Champlain R. R. Co., and on the 1st day of March, 1870, it was ordered and decreed by the chancellor that their action in entering into said contract is hereby ratified, approved and confirmed in all respects, and they are hereby directed to go on and execute the same. On a like petition filed by the trustees and managers on the 20th day of December, 1870, they were, on the 26th of said December, by the chancellor, authorized to enter into said contract with the Missisquoi R. R. Co. On the 5th day of January, 1871, the trustees and managers filed their petition in the cause, praying that the court would approve their action in entering into said contract with the Rutland R. R. Co., and on the same day, it appearing that the boards of directors of the Vermont Central and Vermont and Canada R. R. Cos., and the committee of the first and second mortgage bondholders had assented to an order of the court approving the same, it was ordered and decreed that their action in entering into said contract be approved, ratified and confirmed, and they were directed to go on and execute the same. The committee of the first and second mortgage bondholders assented in writing to the contract made by the receivers and managers and the Vermont and Canada R. R. Co. with the Ogdensburg and Lake Champlain R. R. Co. in the matter of the issue of \$600,000 of bonds by the latter company for the purpose of controlling the fleet of steamers running from Ogdensburg west, on the 10th day of September, 1871. The trustees and managers filed a petition in the cause on the 18th day of September, 1871, praying that the court would approve, ratify and affirm their action in making said contract with the Northern Transportation Co., and on the same day, it appearing that said contract had been approved by the committee of the first and second mortgage bondholders, it was ordered and decreed by the chancellor that their action in entering into said contract be approved, ratified and confirmed.

Reports were made by the receivers and managers to the committee of the mortgage bondholders from 1864 to 1873, showing the financial condition of the property, its earnings and the expenditures in its management.

At the first meeting of the first mortgage bondholders after the provision in the decree of 1864 providing for the appointment of an

advisory committee, for the purpose of electing such a committee, it was resolved that such committee, when elected, should continue in office until others should be chosen. That meeting was holden on the 23d day of January, 1864, and the first advisory committee of three was then elected. In 1865 a like advisory committee was elected, and after that, and down to 1870, a committee consisting of two of the first and one of the second mortgage bondholders, as provided in the decree of 1866, was annually elected. It does not appear that any advisory committee was elected after 1870, but the persons elected in that year continued to act as such committee.

This constitutes all of the history of the property that it is deemed needful for present purpose to notice. The receivers appointed upon the petition of the Vermont and Canada R. R. Co. in 1861, and those succeeding them by appointment of the Court of Chancery, in connection with the persons and their successors whose appointment was authorized by the decree of August 16th, 1867, and who were, with the receivers, constituted a board of management, remained in possession of said roads and property, and run, operated and managed the same down to the time when the Central Vermont R. R. Co. was appointed receiver and manager, on the 21st day of June, 1873.

Upon the facts above stated and the evidence introduced bearing upon the questions in issue, the rights of the respective parties are to be determined. And first, as to the mortgage bondholders: No question is made as to the validity of both issues of said bonds, or as to the trust deeds that were given to secure them. The only question is, what security the holders of said bonds now have upon which they are entitled to rely for their payment. It is claimed for the holders of said bonds that the securities originally given remain intact; that they are unaffected by anything that has transpired since in the creation of the various classes of indebtedness which are represented in the bill as funded, trust and floating debts. It is claimed by the orators that the holders of the funded, trust and floating debts have priority to the right of the bondholders, and that the property should first be made chargeable for the payment of those obligations. It is admitted that while the receivers, under the decree of 1861, were administering the property which was the subject-matter of their receivership for the uses and purposes indicated by that decree, all debts properly contracted by them as receivers, or which were authorized by the court to which they were accountable, and which appointed them, would constitute a first lien upon the property they were administering. We have seen that the purpose and object to be answered by that decree in continuing the management, possession and control of said railroads in the receivers, was to earn income with which to pay the rent due, and which might grow due to the Vermont and Canada R. R. Co., so that until that object was fully

accomplished, or the receivers were discharged by the parties or order of the court, they would continue strict receivers, and be entitled to the rights and protection which the law accords to such receivers. The first equipment bonds were issued under the decree of September 7th, 1865, and it is claimed by the orators that there was \$97,000 of rent then due to the Vermont and Canada R. R. Co. that the receivers had been ordered to pay out of net income, and hence that that series of bonds amounting to \$700,000 was a receivership debt. It is claimed by the defendants that the payment of the \$97,000 then due to the Vermont and Canada R. R. Co. had been so provided for by the decree of 1864 that the receivers were relieved from all duty respecting it, and that after the decree of 1864 there was no occasion or necessity for the continuance of the receivership, and that it was then legally terminated; but, in our judgment, the right of the holders of those bonds, as well as all of those that were subsequently issued, to priority of security to the holders of the first and second mortgage bonds, does not depend upon the question whether the bonds so issued were strict receivership debts or not.

In the petition that resulted in the compromise decree of 1864, the Vermont Central R. R. Co., the trustees under both mortgages, the committee of the first mortgage bondholders and certain mortgage bondholders were made defendants. Ample notice was given of the pendency of the petition. In the decree which was signed, provision was made in the eleventh article for the appointment of the advisory committee before mentioned, to represent the interests of the first mortgage bondholders, which article was amended in the decree of 1866, by providing that two of said committee should annually be chosen by the first mortgage bondholders and one by the second. Ample notice was given to the trustees of both mortgages, and the committee of the first mortgage bondholders, of the pendency of the petition praying for authority to issue the first equipment loan bonds, and no objection was made to the granting of the prayer of the petition. Notice was given to the trustees of the second mortgage, and the committee of the first and second mortgage bondholders, of the pendency of the petition asking for authority to issue the second equipment loan bonds, and they appeared at the hearing; and it does not appear that they, or either of them, objected to the prayer of the petition being granted. No notice appears to have been given of the pendency of the petition under which the decree was made authorizing the third equipment loan, but it does appear that the committee of the first and second mortgage bondholders, and certain other persons largely interested in the trust property, did appear upon the hearing of the petition and made no objection thereto. No notice was given of the pendency of the petition asking for authority to issue the fourth equipment loan bonds, but it appears that the committee of the first and second

mortgage bondholders appeared at the hearing, and assented to the making of a decree authorizing said loan. The committee of the first and second mortgage bondholders were notified and appeared, and either assented or offered no objection to the making of the several decrees under which the bonds were issued that were negotiated by the receivers and managers. If the action of said committee in what was done by them was binding upon the bondholders whom they professed to represent, the receivers and managers had full authority, as far as said bondholders were concerned, to issue the bonds authorized by said decrees.

In examining the question as to the power and authority of said committee, it is necessary to consider the facts, as developed by the evidence, which induced the parties in interest to require that permanent provision should be made for their appointment. Down to the compromise decree of 1864 the bondholders were simply creditors of the corporation; they had no voice in its management, or right to influence or control its action. Their right to be represented and to participate in the management of the property which was pledged for the payment of their bonds, was recognized, and the provision in that decree for the appointment of such committee was to protect the interest of the first mortgage bondholders. They were constituted an advisory board in respect to the management of said roads and property, with the right to advise the trustees and receivers in respect thereto. They were also constituted auditors of the accounts of the trustees and receivers, and those accounts, when approved by them, were to be passed and allowed without further proceedings; but the right to object to any part of said accounts was reserved to the trustees of the second mortgage and the Vermont and Canada R. R. Co.; and upon such objection being filed the accounts objected to were to be examined and passed upon according to the usual course. As long as the mortgage bondholders availed themselves of the provisions in the decrees of 1864 and 1866, and elected and continued in office the committee provided for by them, they were legally and equitably bound by all that said committee may have done in the execution of the duties imposed upon them by virtue of their office. The bondholders delegated to said committee authority to do what they might individually and collectively have done in the premises. The issuing of the bonds was a matter pertaining to the management of said roads and property, and about which said committee had the right to advise the trustees and receivers; the committee either assented to, or did not object to, the issuing of said bonds by the receivers and managers and in their capacity of receivers and managers. The history of the case shows that both classes of bondholders directly or indirectly received a portion of the avails of said bonds, thus adopting and ratifying to that extent the acts of the receivers and managers in issuing and negotiating them. It probably would

not be claimed that if the bondholders had individually assented to the issuing and negotiating of said bonds upon the representations made in the petitions upon which the decrees were made giving authority to issue them, and which the court found to be true, that they could afterwards question the right of the receivers and managers to issue them in that capacity; and in view of the power and authority given to the committee by the decree of 1864, and what has since transpired in the matter of adopting and ratifying the action of the committee, we think that the bondholders are bound by their action in the premises as fully as if they had individually assented. The bonds were negotiated by the receivers and managers, and it is alleged in the bill that the avails were used for the purposes designated in the decrees authorizing their issue. The interest was paid on them out of the income of the trust property down to 1876.

The receivers and managers were not discharged by the court until the appointment of the Central Vermont R. R. Co., and no persistent attempt has been made to have them discharged by the bondholders or any one else interested in the property. They were recognized as receivers and managers by all the parties interested in the property, by the Legislature of the State, and in all courts where questions have been adjudicated affecting the rights and liabilities of those interested in the property. Purchasers of the bonds relied upon the apparent authority of the receivers and managers to issue them, and upon the security that such obligations ordinarily give. Which has the superior equity? such purchasers or the mortgage bondholders? It is claimed that the persons claiming to be receivers and managers were not strict receivers, and hence that the obligations which they gave cannot in a court of equity be treated as receivers' debts; but in our judgment it is immaterial whether they were strict receivers or not. The bondholders suffered them to appear to be receivers, and to issue negotiable bonds as such, and where one of two innocent parties must suffer by the act of a third, he who gave the power or opportunity to do the act must bear the burden of the consequences. If there was any defect of authority on the part of the receivers, the acquiescence of the bondholders in what has been done by them is as effectual as the most formal authorization in advance or ratification afterwards, would have been. So that, as between the bona fide holders of the bonds that have been issued and negotiated under the so-called orders and decrees and those that have been received in exchange for them, and the Vermont Central R. R. Co., and the mortgage bondholders, the former have the superior right and must be first paid.

We come next to the consideration of the claims of the stockholders of the Vermont and Canada R. R. Co. The contracts entered into between the Vermont and Canada Co. and the Vermont

Central Co., in 1849 and 1850, have been substantially stated. The history of the litigation that ensued between the parties to those contracts, and which resulted in the decree of 1861, is elaborately stated in the report of the case in 34 Vt. 1. The validity of said contracts, and the right of the Vermont and Canada Co. to the security given by the contract of 1850 for the rent agreed to be paid, was then established. It is important, in determining what the present rights of the Vermont and Canada stockholders are, to state somewhat in detail the questions, and how they arose, that were then adjudicated. Neither the Vermont Central R. R., nor its income, was pledged for the Vermont and Canada's rent under the contract of 1849. Under the contract of 1850 it was agreed that if the rent reserved to the Vermont and Canada R. R. Co. should be in arrear and unpaid for the space of four months after due, it should be lawful for the Vermont and Canada Co. to take possession of and use and run both roads, and receive all tolls, fares and income receivable for the use of the said roads, and after paying all reasonable expenses of running and working said roads, and making such repairs of the same and the buildings and structures connected therewith, and the expense of all such engines and cars as might be necessary, to apply the residue of said receipts to the payment of rent then in arrear and unpaid, whether it shall become payable before or during the time while so in possession. The Vermont and Canada Co. reserved the right of resorting to an action at law to recover any rent in arrear if it should choose to do so. There was a further stipulation in that contract, which it is claimed by the Vermont and Canada R. R. Co., was, in legal effect, a mortgage by the Vermont Central R. R. Co. to the Vermont and Canada R. R. Co. of its road and franchise as security for said rent. The Vermont and Canada R. R. Co. brought its bill in equity praying that it might be let into possession of both roads, or that the court would aid it in securing the income of the same pursuant to the contract of 1850; or that if it did not seem fit to the court to make an order putting it in possession, that the court would appoint some suitable person or persons, to be the receiver or receivers and the manager or managers, of said roads and property. It was under this prayer that the court, in 1861, ordered and decreed that the possession, control and management of said roads and property should be continued in the then receivers, subject to the order and direction of the court. It was upon the application of the Vermont and Canada R. R. Co., and to render the security given by the contract of 1850 available that the order was made, and the receivers were ordered to pay over to the Vermont and Canada R. R. Co. on the first days of June and December in each year, such sums as might accrue from the earnings of said roads and property, until the sums then due and growing due to them under the contracts of 1849 and 1850, should be fully paid and satisfied.

It is claimed that the rent reserved to the Vermont and Canada R. R. Co. was secured under the decree of 1861 upon the gross income of the property, but we do not so understand it. The court did not by that decree change or vary the contract of 1850, but decided it to be a valid and binding contract, and made provision for carrying it into effect; so that in ascertaining what income was secured for the payment of said rent, resort must be had to the contract of 1850. It will be seen that by that contract certain expenses were first to be paid and the residue of the receipts was to be applied to the payment of rent. The fund that was made applicable to the payment of rent was what might remain of the earnings or income after the payment of said expenses, and this would be the net income. There is no ambiguity in the contract; and to construe it as pledging the gross earnings or income would be giving it a construction not warranted by the plain import of its language or the evident intent of the parties who made it. In *The Vermont and Canada R. R. Co. v. The Vermont Central R. R. Co., et al.*, 50 Vt., page 560, Judge Barrett says, in remarking upon the decision made in 1861, that the Vermont and Canada R. R. Co. was to have the net income from the use of both roads applied to the payment of its rent; and on page 587 he defines net earnings to mean what is left after paying the legitimate cost and expense of making earnings by the use of the property.

The receivers and managers, and their successors by appointment, continued in the possession, management and control of said roads and property without objection or protest of the Vermont and Canada R. R. Co. or any of its stockholders, until the 21st day of June, 1873. The rent upon the original stock and the stock that was subsequently issued, was paid by the receivers and managers down to 1872; no motion was made for their discharge and no notice was given that their duties were terminated and ended. There is nothing in the record tending to show but that the Vermont and Canada R. R. Co. and its stockholders regarded and treated them as occupying the same relation to the property during all that time that they occupied from 1861 to the time when the rent in arrear was fully paid. In the petition praying for authority to make the first equipment loan, the receivers set forth the gross and net income of the property for the years 1864-5, that they had made large expenditures in extending the Vermont and Canada line, and in purchasing increased fixtures and equipment; that to provide for and accommodate the business with justice to the public and to the best interest and profit of the line, large additional structures, fixtures and equipment were required, and that they had no funds with which to make them; that if the income of the property was to be devoted to that purpose, the payment of rent and interest provided for in previous decrees would be necessarily suspended. The Ver-

mont and Canada R. R. Co., upon the return-day of the petition, appeared, by its solicitor and a majority of its directors. The court found the matters stated and set forth in the petition to be true, and made the decree, thus enabling the receivers, by the avails of the bonds issued under the decree, to provide the necessary structures, fixtures and equipment with which to earn income by the use of the property that was applicable to the payment of the Vermont and Canada rent. What has been said in relation to there being rent in arrear to the Vermont and Canada R. R. Co. at the time that decree was made, and the bonds issued under it, need not be repeated.

In the petition for leave to make the second equipment loan the receivers represented that they had expended the whole income of the property in making the improvements and purchases specified in the petition and were still under liabilities, on account of such expenditure for the benefit of the trust, of about \$753,000, and without funds with which to pay the accrued and accruing rent of the Vermont and Canada R. R. Co. and the interest on the trust debt. Public notice was given of the pendency of the petition, and neither the Vermont and Canada R. R. Co., nor any party in interest, appear to have objected to the granting of the prayer thereof, and upon the finding by the court that the facts set forth in the petition were true, the decree was made. The petition for the third loan set forth the same reasons (substantially), to justify it, as were set forth in the petition for the second, and upon the hearing the court found that the directors of the Vermont and Canada R. R. Co. at a meeting called and held on the 9th of April, 1869, voted to assent to a further issue of equipment bonds not exceeding one million dollars over and above the present; and the decree made authorized the issue of one million dollars.

The petition for the fourth, or what is commonly called the guaranteed loan, alleged that there was outstanding against the receivers a floating debt of about \$1,500,000, which had been created in improving the road-bed and superstructure of both roads, and providing such additional equipment as was necessary for the useful and efficient operation of said roads, and for other purposes incident thereto; that if said debt should be paid out of the net earnings of the roads it would embarrass the payment of dividends and interest; and that the Vermont and Canada R. R. Co., at a stockholders' meeting, had voted to endorse and guarantee their notes to the amount of one million of dollars, if the court should give them authority to issue them. The vote passed at the stockholders' meeting therein referred to has been hereinbefore recited. All parties in interest being represented, and assenting to the granting of the prayer of the petition, the decree was made accordingly. The fifth and last petition, asking leave to make a loan, represented that the first equipment loan of \$700,000 would become

due on the 1st day of November, 1875, and that provision should be made for its payment; that there was a large debt outstanding against the receivers and managers, in the form of a temporary loan which had been contracted, in part, by the purchase of personal property, supplies and equipment upon the lines recently leased by them, and that further equipment was required for the use of said roads. Notice was given to the Vermont and Canada R. R. Co. of the pendency of that petition, and the president of the company appeared upon the hearing. No one objected to the prayer of the petition being granted, and a decree was made authorizing the issue of not exceeding \$2,500,000 of bonds for the purpose of retiring the first equipment loan and for the other purposes named in said petition.

This constitutes the history of the manner and circumstances, as far as the same need be given, under which the persons assuming to act as receivers and managers issued the bonds authorized by said decrees. The bonds were negotiable in form, and have been sold and transferred like other negotiable paper. There is no evidence tending to show that any party who has held or now holds them had notice of a want of authority to issue them for just what they purported to be—obligations of receivers and managers. All that has been said in relation to the claims made by the mortgage bondholders applies with equal force to the rent claim of the Vermont and Canada R. R. Co. That corporation and its stockholders, with knowledge that the receivers and managers were acting as such, and appearing to the world as their receivers, and issuing negotiable obligations as such, have remained passive and suffered the deceit (if there was deceit), to continue without giving a note of warning to parties who are liable to be deceived by such appearances, or putting on record a single fact that might have led to the discovery that the obligations thus issued were being issued without lawful authority.

The rights and liabilities of the parties are not dependent upon the rules of law as understood and administered in a strict receivership. The Vermont and Canada R. R. Co. has so conducted that it is estopped from denying that the acts of the receivers, while acting as such, are as binding upon it as the acts of strict receivers would have been; hence the payment of the rent claim of the Vermont and Canada R. R. Co. must be postponed to the payment of the bonds issued by the receivers. As between the bona fide holders of the bonds so issued, and those that have been received in exchange for them, and the Vermont Central R. R. Co., the mortgage bondholders, and the Vermont and Canada R. R. Co., the former have the superior right and must be first paid; and the holders of such bonds are entitled, after the special security which was pledged for their payment has been applied, to have the property of the Vermont Central R. R. and the Vermont and Canada

R. R., or the earnings or income thereof, appropriated to pay what may then remain due on the same.

The floating debt, the orators claim, has been contracted for money borrowed for the current business of carrying on and operating said roads and the purchase of material and supplies; that without the advance of said money the roads could not have been operated, and that it is unsecured by any special pledge of property. The orator, the Central Vermont R. R. Co., avers that at the time of its taking possession of the roads and property, there was a large floating debt outstanding, incurred by the former managers in the operation and management of the property, which it was obliged to pay; that without the payment of said money by it the roads could not have been run and operated, and that it now constitutes a proper debt due to it from the trust or the trust property. The defendants claim that the money so paid was paid without legal authority and unauthorized by them, and that the Central Vermont R. R. Co. and others making such payments and advances have no lien upon the property or income to secure its repayment. The same claim is made in relation to the rest of the floating debt and the additional claim that that debt was incurred in part in the execution of contracts made by the receivers and managers, which were outside of and wholly disconnected from the management of the property which constituted the subject-matter of the receivership under the decree of 1861. The history, character and quality of that debt has not been so ascertained as to justify making any order concerning it, and we purposely avoid any intimation as to the equitable rights of the holders of that debt. Upon the coming in of the report which will be made to the Court of Chancery, those claims will stand for consideration and determination, and such rights can be accorded to the claimants as the facts so to be found will legally warrant.

The rights and liabilities of the Central Vermont R. R. Co. are so far dependent upon the facts that may be found in relation to the floating debt, which it claims it has paid or assumed, and for which it asks reimbursement and indemnity, that any decision attempting to define and settle those rights and liabilities would now be premature. Its equitable rights cannot be fixed and determined until the facts connected with its possession of the property and the floating debt are so presented that the court can form a judgment based upon them and the law applicable to them. Neither is there any present necessity for making any remark as to the character in which the Central Vermont R. R. Co. took, and has since retained the possession of the property, or for giving any direction to the Court of Chancery for its guidance in the ascertainment of the amount which has been received by that company, and how it shall be appropriated.

In passing upon the questions in issue in this cause, we have

proceeded upon the theory that as between the Vermont Central R. R. Co., the mortgage bondholders and the Vermont and Canada R. R. Co., and the parties that are making claims against the property in opposition to them, the Vermont Central R. R. Co., the mortgage bondholders and the Vermont and Canada R. R. Co. are estopped from denying that the parties professing to act as receivers and managers had power and authority to bind them and the property to the same extent, and for the same purposes, that strict receivers might. Enough appears to clearly justify the application of that rule to the Vermont Central R. R. Co. and the mortgage bondholders. From 1864 to the time of the last issue of bonds by the receivers and managers, the bondholders by their advisory committee assented to the issuing of the obligations that were issued, knowing that they were being issued by the receivers and managers, as such, and being negotiated and sold to innocent purchasers, and that the avails, in part, were being used for the payment of the interest upon their bonds, and in making valuable and permanent improvements upon the property on which their security rested.

There is a seeming hardship in applying the rule to the Vermont and Canada R. R. Co. That company, in the first instance, had no further interest in the improvement or conservation of the property, than that it should be in a position to earn net income with which to pay its rent. It might well have remained passive as long as that rent was paid, and it was the right of the Vermont and Canada R. R. Co. to apply to the court to enforce the remedy provided for in the contract of 1850, when the rent should be in arrear. When the receivers, who were appointed upon its application, had executed their duty by paying the rent in arrear, it was the right and duty of the Vermont and Canada R. R. Co. to see to it that they were discharged, if it would avoid the consequences that might result from their longer continuing to exercise the duties of receivers, and to appear ostensibly as its receivers. From what was done by the Vermont and Canada R. R. Co. in participating in the issue of the bonds by the receivers and managers, the parties who purchased them no doubt understood, and had the right to understand, that they were purchasing paper that the receivers and managers had the lawful authority to issue, as such, and that the Vermont and Canada R. R. Co. recognized them as its receivers. The Vermont and Canada R. R. Co. now claims that it should be remitted to its rights as defined by the contracts of 1849 and 1850, unaffected by anything that has since transpired.

In determining the equitable rights of the parties, it seems to us that the rights of the holders of the bonds issued by the receivers and managers are superior in equity to the rent claim of the Vermont and Canada R. R. Co., and that they are entitled to the realization of the security which they supposed they were obtain-

ing, as far as it can be accorded to them, in preference to the rent claim of the Vermont and Canada Co. It was held in 50 Vt. *supra*, that the holders of said bonds were entitled to the benefit of the securities pledged for their payment, but whether they were limited to such securities, as the only resource for compelling payment, was left undecided. It will be observed that the bonds contain an absolute and unconditional promise to pay, and that the pledge was collateral to that promise. Whether the taking of a special security is, in law, a waiver of all other securities or not, is generally to be determined by finding what the understanding of the parties to the transaction was at the time of the making of the promise and giving of the security. The proof clearly shows that it was not understood at the time the bonds were issued, that the security which was pledged was the only security which the holders had the right to rely upon to enforce their payment. The most that can be claimed by the other parties interested in the property, is that the property specifically pledged shall be first appropriated. The different classes of bonds, after the application of securities pledged for the payment of each, stand upon the same common right, and upon perfect equality in the matter of exacting payment.

We have not been much aided by precedents in the determination of the questions involved in this controversy. We have not discovered any case so analogous to this in its facts as to be authoritative, but in its decision we have endeavored to follow and be guided by those familiar principles of equity law that are universally applied in the determination and enforcement of equitable rights. We do not intend by what is now held to overrule the decision made by this court in Vermont and Canada R. R. Co. v. Vermont Central R. R. Co., et al., 50 Vt. 500. The opinion in that case defines the equitable rights of the parties substantially as they are now determined. We have built upon the foundation there laid. It is expected that what is now decided may result in the apportionment and distribution of the property in litigation, or the avails thereof, among those entitled to it, and by placing it under their own control to get rid of the disastrous litigation that has lain like a nightmare on the property for so many years.

And in view of the criticisms that have been made upon the actions of the different chancellors who have made or approved the orders and decrees which, it is claimed, have resulted in such disaster to the property, it is but an act of justice to say that there is not one of them that authorized the incurring of any pecuniary liability, or the making of any contracts that have resulted in a loss, to which the parties in interest had not given their assent, or failed to make any objection to, after having notice and opportunity to do so. In making such orders and decrees there was no occasion for the exercise of judgment. It was the method devised

and agreed upon by the parties to give what it was then understood would be a judicial sanction to acts and agreements of the parties; and the court has never been called upon to interfere by direction or advice in the management or control of the property.

The pro forma decree of the Court of Chancery dismissing the bill is reversed, and cause remanded with a mandate that it be referred to a master or masters, to ascertain and report the amount due of principal and interest on all the bonds issued and negotiated by the receivers, as such, or as receivers and managers, or as trustees and receivers, or as trustees and managers, and the consideration upon which they are held; the kind and value of the property pledged to secure the payment of each of the different classes of said bonds at the time it was so pledged, and its present value; the kind and value of the property purchased, with the avails of the car-service pledged to secure the payment of said bonds when purchased, and its present value; the amount received from the car-service pledged to secure them, and how the money received on account of said car-service has been used and appropriated; the amount due on account of the floating debt; how, when and under what circumstances it has been contracted; what proportion of said debt has been contracted for, or has grown out of the necessary expense of running and operating and maintaining said roads and property, and when. And that upon the ascertainment of such facts, a decree be entered that will secure the realization of the rights of the bondholders, as hereinbefore defined, and the rights of any other of the parties as they may be determined.

The following opinion was received by the Reporter on the 26th day of March, 1881, and by the request of Judge BARRETT, it is published here:

Opinion by BARRETT, J.—Deeming it due to all interests concerned, as well as to myself, that I should make known my views in this case, and having ceased to hold the office of judge before the opinion of Judge Royce was filed, and not having seen it till the middle of the first week in January, 1881, I have thought of no more proper way to do it than to put on file a redraft of a paper I furnished Judge Royce before my term of office had expired, with some verbal changes not affecting the sense, and with some omissions which his printed opinion renders proper, followed by some quotations from the opinion of the court in the case of *Vermont and Canada R. R. Co. v. Vermont Central R. R. Co. et al.*, 50 Vt. Rep. 500.

The present case in material subject-matter, constituting the ground of rights, duties and liabilities to be ascertained, declared and enforced is substantially the same in the case decided by this court in October, 1877, 50 Vt. 500. It was in that case decided

that after the compromise decree there had been no receivership created and administered by the court, but only a contract management, under the control of the parties in interest. It should not now be held otherwise, nor should this case be disposed of on any different ground. It should be considered and disposed of as one in which the holding and management, after the compromise decree went on by the agreement of the parties, down to the accession of the Central Vermont R. R. Co., and not by the control and order of the court.

This was expressly held and demonstrated in the decision of 1877.

The Central Vermont Co. came in upon its own asking and the asking of the persons who had held the management down to that time, and who were largely the stockholders and officers of that company. It came in, not under the compromise decree, nor with the consent of the parties to that decree, but against the will, and wish, and the objection of said parties. Those persons theretofore holding the management did not represent the parties and interests for whose behoof they held their position under the compromise decree, in asking to be supplanted by the Central Vermont Co.

To do so was outside their official prerogative, and in violation of their fiduciary right and duty. (See *Stevens v. Willard* and others, 43 Vt. 692.) The Central Vermont Co., therefore, stands in no relation or privity with the primary parties (viz., the Vermont and Canada Co. and the Vermont Central Co. and its mortgage bondholders), that entitles said Central Vermont Co. to indemnity or reimbursement as against those parties for the expenses in any way incurred in holding, managing and operating said property. It took the possession and management, subject to the right of the Vermont and Canada Co. to its rent, and of the said mortgage bondholders to their interest and principal.

No creditor of the Central Vermont Co. has claim, legal or equitable, to be answered by or in preference to the Vermont and Canada Co., or said bondholders, or to be enforced against or in preference to said parties. Said Central Vermont Co. is not entitled to set up any claim against said property or the earnings, in prejudice to the rights of said parties to their rents, and to the interest and principal on their bonds. That company is answerable for the utmost care and discreetness in managing the property as a source and means of realizing income, wherewith to pay said rent and said interest and principal. It cannot charge against said rights of either of said parties any outlays for improving the road or its equipment beyond necessity of preserving the property and doing the business. The property is in the hands of said company charged with the first duty to realize income, and pay said rent, and bonds, and interest, and with no right to make

outlays beyond what is just named, and charge the same on said income, or on the corpus of the property. Whatever is done by way of adding value to the property, beyond keeping it in working order, to the end of realizing income with which to pay said rent and bonds, must be at the expense of the Central Vermont Co., and not of the parties who are entitled to the earnings of the property, when kept and cared for, and used as those parties themselves would have done, if in possession and managing, with a view of realizing the utmost earnings and income consistent with keeping the property from waste or deterioration for current practical use.

The claim and right of the Vermont and Canada Co. is for rent, and not for the possession, as owner, of either of the roads. The claim and right of the bond-holding mortgagees is for payment of the interest and principal of their bonds, or the possession of the two roads (having title to the Vermont and Canada R. R. under their mortgages, and the right of use of the Vermont and Canada R. R. under the lease). The Central Vermont Co. holds subject to those rights, and only by answering to them should it be permitted to hold.

There is no floating debt accrued since the Central Vermont took possession, to which the Vermont and Canada or the mortgage bondholders should be subjected or postponed. They cannot properly be subjected to or affected by any floating debt, unless for what accrued while they were parties to the management under the compromise decree, and prior to the time the Central Vermont Co. took possession. They are not answerable to said company unless it holds, as assignee, unpaid debts of the prior management, that the original creditors would be entitled to enforce in preference to said rent and bonds, and that said company may be equitably entitled to enforce, in view of all that affects its relations to the subject and to said other parties.

Recurring to what is said on page 46 of the pamphlet print of the decision of 1877 (I here insert it, thus):

"The participation of some of the parties in interest in the current administration, in one way and another, through advisory boards, and standing and temporary committees, and by stockholders' and bondholders' votes, and by the action of directors, may have an important bearing in determining ultimate rights and liabilities, if they should hereafter be brought in question before the courts; as also may the fact that the managing parties may have been largely interested in the subject-matter and the results of the management."

I therefore proceed to say, that no definitive decision and mandate should now be made, in advance and anticipation of facts actually found and established; or upon any hypothesis or theoretical supposition as to what may be hereafter found or established as

The title to the property is in the Vermont Central R. R. Co., subject to the rights of the Vermont and Canada Co. and said mortgage bondholders. The original trustees and managers under the compromise decree had only the possession in trust. The Central Vermont Co. has possession only in trust. Its position is trusteeship for the behoof of the Vermont and Canada Co. and of said mortgage bondholders, whether it obtained and holds the position rightfully, or without lawful right.

The foregoing is, in substance, what I said, or meant to say, in our last consultation, without regard to the order.

I desire that the other judges should see this manuscript prior to considering and passing judgment upon the draft or opinion which I suppose you will make and submit to them before announcing the decision and promulgating the written opinion.

In view of what was said by myself and the other judges, when in our last consultation I called attention to what was said in an article, signed "A Boston Lawyer," printed in the Boston Daily Globe of December 26, 1877, and afterwards reprinted in other papers, copies of which were sent to me; viz., "That the entire Supreme Bench, with the exception of its author, very much regret its" (the opinion delivered by me in October, 1877) "delivery in such form, and would be very glad to recall and revise it, if that were possible." I urge and expect that, in the opinion to be drawn up by you, it should be distinctly stated that the judges constituting the court that made the decision in October, 1877, still hold the views embraced in that opinion.

I have been many times credibly told that the sentiment of the above, from the article in the Globe, has been often and sharply expressed by representative men who were not satisfied with that decision.

The foregoing, with said verbal changes and said omissions, is what was furnished to Judge Royce, as above stated. In view of some expressions in the opinion by Judge Royce, about having "the property of the Vermont Central R. R. Co. and of the Vermont and Canada R. R., or the earnings or income thereof, appropriated, etc.," and about "the apportionment and distribution of the property in litigation or the avails thereof," etc., and of a kind of complexion which it bears when compared with the opinion of 1877, I deem it proper to quote some passages from the opinion of 1877, as follows:

"It has already been said, that in the case as it is now before the court, and for the purpose of the case, the various parties in interest may not question the validity of the proceedings, as shown by the record, so far as those parties are affected by consent and acquiescence in said proceedings and the carrying of them into effect. It is now to be remarked, that however they may be affected thereby, it must be in virtue of the substance and reality of what

has been transacted by parties and court, and not in virtue of formality and semblance. In entering into the agreement for the compromise decree, and assenting to it and acting under it, the parties are entitled to regard it, and to have it regarded, as being just what it was understood and designed to be, viz.: a permanent arrangement by agreement for the administration and handling of the property, with such control by the interested parties as was provided for, and with such a relation to the original cause and the functions of the court as was understood to be provided for in that compromise agreement and decree. And the same is true as to all that ensued by way of orders and decrees. As did the compromise decree, so the subsequent orders and decrees, as to the various matters embraced, derived their force from consent. The present proceeding supervenes upon all that has been ordered and done, for the purpose of a final consummation and ending of the entire matter, and of dismissing it and the parties and interests from any cognizance of the Court of Chancery. Of course, this requires the court to have regard to substance and reality of what has been done, whereby the matter is brought down to the present conjuncture.

"As is said in *Wadhams v. Gay*, before cited: 'Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem;' and the judge proceeds by way of application: 'In outward semblance, this partition decree is a decision of the court upon the relative rights of Charles D. Flaglor and his children under the will of Garrett. In essential character it is but the judicially recorded supposed agreement of Flaglor.'

"The court could not, in the first instance, bind by judgment, decree, and order beyond the scope of the original bill, except by consent, and by acquiescence in the execution thereof, and it would be without warrant for the court to supervene upon what has come to pass in virtue of agreement, consent, and acquiescence, and deal with the subject and the parties the same as if all had been done within the scope of the original bill and under the original decree, in the legitimate exercise of judicial prerogative, in the discharge of judicial duty, and as the result of independent judicial judgment.

"So far as consent was given to, and there has been acquiescence in, the compromise decree, and in its execution, it was on the supposition that it would have operation and effect according to the intent indicated by its terms and provisions. But for that, the agreement would not have been made or the consent given. It was in that view that it became the law for the administration of the property, as distinguished from the law that ruled the original decree, and would have continued to rule, so long as that decree was the rule and authority for the administration of

the property. In that view the Court of Chancery performed its part in and under the compromise and subsequent decrees. All the contracts of lease have been entered into and have gone on in operation in that view. All the credits have been obtained upon managers' bonds and their securities, and on stocks newly issued, and changes and substitutions of credits and securities have been made in that view. Now, when it is claimed or held that parties are concluded and bound by participation, acquiescence or consent, it cannot be held that they are thus bound by and to something other and different from the real substance and fact of the successive proceedings, measures, and transactions, as they currently went on, and were understood and intended by all concerned.

"If the Vermont and Canada R. R. Co. had forecast that it would be the possible result of the compromise decree that the Court of Chancery would have, or exercise, the power of ordering a sale of all the property to a third party to pay the expenses of administration under that decree, leaving rent unpaid and unprovided for, would it have been party to the compromise consummated by that decree? The same may be asked as to the mortgage bondholders of the Vermont Central R. R. Co. individually and representatively. If such a result had been forecast, would parties have taken the various classes of equipment and guaranteed bonds, and other credits to the trust, purporting to be backed by specific security on the property, and on car service, and by the guarantee of Vermont and Canada R. R. Co.? For what is the ground of the credit, and what the resource of the Vermont and Canada R. R. Co., but the stipulated rent, with the security for it, and the right to have it paid or realized as provided in the solemn contract of lease and the provisions of the compromise decree,—namely, to be earned by the two roads under the administration provided therein, and by what ensued thereon by way of agreement and supervening orders of the court? Would the parties to that decree have agreed to its being made, and participated in its execution, if it had been forecast, as a possible result, that the effective force of the lease and mortgages as contracts was to be annulled, and the rights created thereby to be abrogated and rendered impossible of realization, and the decree itself to be declared a nullity except to the end and effect of warranting the Court of Chancery to deprive the parties to it of the ground and subject-matter of their rights, which it professed to confirm, and was designed to serve and realize? Would the holders of the trust loans have become such, if it had been forecast as possible, that not only the promise to pay, but the pledges of specific security, were, by judicial act and sanction, to be 'broken to the hope,' and, further, not only not even 'kept to the ear,' but disclaimed and annulled? If other contracting parties had forecast such a result, would they

have entered into the various contracts of lease, and traffic, and control?

"All present interests have come into present posture in full view of the system devised and instituted, and carried forward by the compromise decree, supplemented by what has been devised and done since. The Vermont and Canada R. R. Co. voluntarily assumed its part and position in reference to, and under the decree of 1864, and participated in and helped forward the whole course of transactions and events down to the time it failed to get its 8 per cent on \$3,000,000 in June, 1872. The first and second mortgages of the Vermont Central R. R. Co. did the same, down to the time they failed to get payments under the administration which they had helped to establish and operate. All bond creditors, and all floating-debt creditors, since the compromise decree, have become such, knowing, or bound to know, the legal and actual status and character of the subject and of the parties with which and whom they were dealing. The central Vermont R. R. Co. solicited the official position of receiver and manager, upon a joint petition of itself and the then board of management, in succession to that board, and the position was accorded, with all the responsibilities then existing, and thereafter to accrue, which rested upon that board, and would thereafter have rested upon it, if it had continued in the management.

"To all, the records of the Court of Chancery, and the files in the clerk's office, and reports in the office of managers, promulgated to all by pamphlets and newspapers, were accessible and intelligible; and they disclosed the status and the course of management under the decree of 1864, and what was the real character, in law and in fact, of that management. The managers and others having deep interest and active participation in the measures devised, and in the course pursued, were full of knowledge of all that was in progress, both official and not official; full of knowledge of what was the substance and reality of the matters in hand, and what was formal and factitious. Ignorance of the facts cannot be asserted by any party as constituting an element or ground of right or claim to preference or priority as against or over any other party. All and each must stand as claimants or creditors with such rights as exist in them respectively resulting from the reality of the transactions by which they are affected. As their position as claimants or creditors has become fixed in view of the compromise decree, and the ensuing administration, designed, devised, carried on, and regarded as already set forth, they are entitled to have that view realized to themselves respectively to the utmost extent practicable. It would be without reason and without warrant to bind them to the legal character of the receivership of 1861, as governing the prerogative and duty of the court in reference to the property and interests now involved, when, in point of fact and of law, the essen-

tial character and purposes of the receivership were changed by the decree of 1864, and the whole course of control and management has been, not for the purpose to be served by the original receivership, but for purposes not in the mind of the court, or of the parties, or of the public, when that receivership was created, nor down to the compromise decree of 1864.

"It is plain that the Vermont and Canada R. R. Co. and mortgage bondholders of the Vermont Central R. R. Co. hold a position relative to the subject different from that of the creditors of the trust. The ground of right and claim of the former was the lease of the one, and the bonds and mortgages of the other. It was to render available the right of each respectively that the compromise decree was made and went on in execution. The management and administration were subjugated to the legal incidents and consequences thereof; and we do not understand it to be controverted, that the expenses properly incurred are to be paid, before the beneficiaries of the trust are entitled to partake of the earnings. The contest has been against making such expenses a charge upon the corpus of the property, in priority to other rights and interests, in such a sense and manner as to render the sale asked for lawful and needful.

"The creditors of the trust, as they are called, have become such by transactions having reference to the carrying on of the business and administration of the management under the compromise decree. Primarily, that business and management were not carried on for their interest and benefit, and not at all for their benefit except as they were interested in such success as would make sure the payment of their claims. It is true that the managers were to hold and use the pledged equipments, and out of car service were to earn money to pay on those claims; but that was not in such a way or sense as to make the pledges chargeable with the expenses of such use and service. That use and service were in the administration that was going on for the behoof of the primary parties, and at the charge of such administration.

"It may now be said, summarily, as the result in this respect, that the Vermont and Canada R. R. Co. stand upon their lease, under the compromise decree, and the decrees and orders following, with the right to have the stipulated rent paid out of the net earnings. Subject to this, the mortgage bondholders of the Vermont Central R. R. Co. stand upon their mortgages, under the compromise decree, and the decrees and orders following, with the right to have the net earnings appropriated according to the respective provisions in that behalf. 'Net earnings' means what is left after paying the legitimate cost and expense of making earnings by the use of the property.

"The holders of the trust bonds stand upon the rights created and vested by the respective transactions constituting the issue, appro-

priation and receipt thereof, respectively, including a right to the security provided, according to the legal effect of the provision making such security. The bonds were taken for the required consideration in faith of the promise to pay interest and principal as stipulated, and in reliance on the security provided and pledged. This vested in the bondholder the right resulting from the transaction by the legal effect of the promise, and to the security pledged. This is in no manner affected by the fact that the promise may not be performed, and the security may prove inadequate and worthless. Of course the bond-buyers knew what they were buying, viz., a bond issued and secured in the carrying on of the management of the property by the persons in charge, as such management was shown by the records, and files, and official documents to have been created and carried on, and which might continue to go on indefinitely in the uncertain future. In view of this, each bondholder took the hazard of both the present and prospective value of his bonds, as depending on the ability of the promissor, and the value of the security. If it should turn out that the pledged property had been used up or become worthless and the car service fruitless, and the guarantee of the Vermont and Canada R. R. Co. a barren resource, that would not touch the validity and operative force of the contract and the pledge.

In this connection supplementing a remark already made, it occurs to be said, that if it were to be held that all the property in the managers' hands would, as against the original parties, be chargeable with the debts of the management, the property thus specifically pledged would, as against the pledgees, be chargeable subject to such pledge.

"It is not deemed needful for present purposes to decide or debate whether the holders of the secured bonds are, on the one hand, limited to the security as their resource for getting payment of their bonds, or, on the other, they are to be regarded as having all the rights of unsecured creditors, with the security superadded. Nor is it needful to decide or debate the operation and effect, in the order of April 20, 1872, for the loan of \$2,500,000, 'that the notes issued under this decree shall constitute a lien and charge upon the trust property, under the control of said trustees and managers, and the earnings thereof.'

"As to what is called the 'floating debt,' which rests upon the credit given to the trust management, the reason is not obvious why that debt should have precedence to any other of the trust debts,—trust debts as distinguished from the claims of the Vermont and Canada R. R. Co. and the Vermont Central bondholders. The secured trust debts were contracted in the carrying on of the business of the management, for the purposes contemplated and sought to be accomplished by the managers,—just as the floating debt has been contracted, and for the same purpose. It can make no differ-

ence whether that debt is due to outside parties, or to the party managing. It is equally on the credit of the trust. The fact that it is without specific security does not give it a higher rank, or a different right, from debts with security. It stands upon the credit which induced the contracting of it, viz., the promise of the managing party in view of ability and means for payment, just as the secured debts stand on the same credit, and the security provided. What is now claimed is, that that debt shall have precedence of the other trust debts, making it first in right as to means of payment, even to the appropriation of the security pledged for the payment of the other debts. There would be no warrant for this, even in case of a proper receivership. The trust is the debtor to each and all its creditors. In the settlement of insolvent estates of deceased debtors the statute gives priority to doctor's bills and other expenses of the last sickness and funeral charges. But we know of no statute, or rule of law, that would warrant the priority claimed in this case.

"For the purpose for which the case is now before the court, we do not design, nor would it be proper, to go beyond the needs for disposing of it with reference to that purpose in determining the status rights, and liabilities of the respective parties and interests. When specific rights are claimed, and specific liabilities sought to be enforced, then will be the proper time and occasion for considering and determining what may be specifically before the court in that behalf.

"As already said and sufficiently shown, the position and office of the Central Vermont R. R. Co. is to be regarded, not as that of a receiver, in the sense of the law, but of managing agent for the parties in interest, having the character and office of an administrative trust. Its primary relations are to and with the cestuis que trust and its claim for outlay, and service, and expenses incurred, is to be considered, established, and satisfied with reference to that relation.

"In view of that relation, is there any warrant of law for ordering a sale of the property? No case and no book has been presented or come to our notice in which it has been propounded or held, that, in a real receivership for managing property, to realize profits by use and not with a view to its ultimate sale, and the realization of money assets thereby, the property has been, or should be, sold to realize means for paying charges incurred in the management. The cases are numerous of sales by receivers under the order of the Court of Chancery. But no case is found in which such sale has been ordered as a means of reimbursing receivership expenses, in virtue of a lien in that behalf."

The cases of *Humphreys v. Allen*, and *Langdon v. Vermont and Canada R. R. Co. et. al.* both turn upon substantially the same point, viz., the nature of receivers' powers, and the character and effect of certificates of indebtedness issued by them in accordance with the orders of the court.

The following note is an attempt to present in compact shape the results reached by the various American cases which have been decided on this point.

The proper functions and duties of a receiver will be found to be treated at some length in the note to the case of *Taylor v. Philadelphia and Reading R. R. Co.*, reported at page 187 of the third volume of these reports.

"The general duty of a receiver," says Mr. Kerr, in his treatise on Receivers at page 196, "may be said to be, to take possession of the estate and premises or any other property, the subject matter of dispute in the cause, in the room or place of the owner thereof; and under the sanction of the court when necessary to do all such acts of ownership as to the receipt of rents, compelling payment of them, management . . . and otherwise making the property as productive for the parties to be ultimately declared to be entitled thereto, as the owner himself could do if he were in possession."

Originally the duration of a receiver's duties was comparatively limited. "His management was an interim management merely" (*Gardner v. London, Chatham and Dover Ry. Co.*, L. R., 2 Ch. App. 212), and was usually speedily terminated by the sale of the property committed to him, or by its restoration to the hands of its owners.

Of late, however, the duties of receivers have come to be viewed in quite another light. They are now called upon frequently, particularly in the case of railroads, to assume control for long periods of time, and to operate the road until the financial embarrassments which have befallen the companies have been satisfactorily adjusted. *Davis v. Gray*, 19 Wall. 203; *Scros v. Toledo, Peoria and Warsaw R. R. Co.*, 7 Bess. 518; *Slemmers Appeal*, 3 Smith, 155. Under these circumstances it is natural that the receivers should gradually come to be considered as properly vested with larger powers than heretofore. Such is accordingly the drift of authority, both in this country and in England. *Munns v. Isle of Wight Ry. Co.*, L. R., 5 Ch. App. 414; *Pell v. Northampton and Banbury Junct. R. R. Co.*, L. R., 2 Ch. App. 100; *Cozens v. Bangor Ry. Co.*, id. 594.

But a receiver is nevertheless generally still recognized as a mere custodian of the property, and has no powers over it other than those conferred upon him by the order of his appointment or by statute.

Yeager v. Wallace, 44 Pa. St. 296; *Grant v. City of Davenport*, 18 Iowa, 194; *Hooper v. Winston* 24, Ill. 368; *Verplafck v. Mercantile Ins. Co.*, 2 Paige, Ch. 453; *Bonneson v. Bill*, 62 Ill. 408. See, however, *Runyon v. Fam. Bank of New Brunswick*, 3 Green, Ch. (N. J.) 480.

He is therefore obliged to obtain the sanction of the court before incurring any expenses for and about the property. *Blunt v. Clitherow*, 6 Ves. 799; *Attorney-General v. Vigor*, 11 Ves. 568; *Thornhill v. Thornhill*, 14 Sum. 600.

This circumstance has led to the existence of another class of persons in this country who are occasionally put in control of property, and who are strictly neither receivers nor trustees, but something between the two. They are appointed by the court, but are also elected by the parties in interest. They are partly in accordance with the orders of the court and partly in accordance with the directions of those whose interest they represent. Such persons were appointed in Vermont and Canada R. R. Co. v. Vermont Central R. R. Co., as appears by the report of that case in 14 Am. R. R. Repts. 497. The powers of such persons depend wholly upon the circumstances of each particular case, and do not admit of treatment in the present note.

To return to receivers. It is clear that a receiver who is called upon to operate a railroad for any considerable time must have at his command the means of raising money. This he does by applying to the court who, having the property under their control, have of course a right to charge it with the necessary expenses of administration.

State v. Northern Ry. Co., 18 Md., Ch. 193; *Meara v. Holbrook*, 20 Ohio St.

187; *Page v. Smith*, 99 Mass. 395; *Crane v. Ford Hopkins*, Ch. 14; *Osgood v. Osgood*, 48 N. H. 70; *Porter v. Williams*, 7 N. Y. 142; *Sprague v. Smith*, 29 Vt. 402; *Covington Drawbridge Co. v. Shephard*, 21 How. 112; *White-water Valley R. R. Co. v. Willett*, 21 How. 422; *Harper v. Winston*, 24 Ill. 253; *Adams and Haskell v. Wood*, 6 Cal. 475; *Sturgess v. Knapp*, 31 Vt. 1; *Wiswall v. Simpson*, 14 How. 65; *Ohio R. R. Co. v. Fitch*, 20 Md. 498; *Booth v. Clark*, 17 How. 322.

The court frequently directs the receiver to issue certificates for the necessary amount, which certificates are to constitute a lien upon the property under his control. The right to issue these certificates is specially conferred by the statutes of Vermont, New Jersey, Ohio and some other States. But independent of statutory enactments courts have a right to authorize their issue. "The power of a court of equity," said Bradley, J., in *Wallace v. Loomis*, 7 Otto, 146, "to appoint managing receivers of such a property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances and to authorize such receivers to raise money necessary for the preservation and management of the property and make the same chargeable as a loan thereon, for its repayment cannot at this day be seriously disputed. It is a part of that jurisdiction always exercised by the court by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." "We have no doubt," said Waite, C. S., in *Fosdick v. Schall*, 9 Otto, 225; "that when a Court of Chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. . . . While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken by the company, cases may arise where equity will require the use of the proceeds of sale of the mortgaged property in the same way."

But this power is in its nature limited. It can only be exercised in cases where the money is needed for purchases or repairs absolutely essential to maintain the road as a going concern. Thus where an application was made to allow certificates to be issued in order to raise money for repairing the track and roadbed, it was said by Chancellor Runyon, "There can be no doubt as to the duty of the court under the circumstances. Every consideration is in favor of making the repairs. The value of the trust estate depends in a great measure upon them. If they be not made the operations of the road must necessarily cease. The injury to the value of the trust estate which would be occasioned thereby would obviously be great, to say nothing of the inconvenience to the public. It is incumbent on the court to see that the receiver keeps up the property by making any necessary repairs, and to that end it may provide the means by pledge of the property, if necessary." *Hoover v. R. R. Co.*, 29 N. Y. Eq. 4.

A like conclusion was reached in *Kennedy v. St. Paul R. R. Co.*, 2 Dill. 448, where the application was to raise money to build the road in order to save to the company a valuable land grant which would otherwise lapse; and in *Jerome v. McCarter*, 94 U. S. 784, where the money was to be employed in completing a canal to save a similar land grant. Also in *Stanton v. Ala. and C. R. R. Co.*, 2 Woods, 566, where certain rolling stock was needed, absolutely essential to operate the road, and where the roadbed needed repairs. See also *Cowdrey v. R. R. Co.*, 1 Woods, 331; in re *U. S. Rolling Stock Co.*, 55 How. Pr. 286; on the other hand if the purpose of the application be at

all beyond keeping the line in statu quo as a going concern, the issue of the certificates will not be authorized. Thus in *Hand v. R. R. Co.*, 10 Rich (S. C.), 406, where the purpose of the application was to enable the receiver to build nine new miles of track and a new bridge so as to obtain access to the city of Charleston, a result which the receivers declared absolutely necessary to enable the road to compete successfully with others for the carriage of the mails. The court below granted the applications and authorized the issue of receiver's certificates. But on appeal, the Supreme Court reversed the order, saying: "It cannot be doubted that the court might, under proper circumstances, order a change to be made in the state of the property in its hands for distribution among creditors with a view to increase the value of the fund, but it is clear that the pursuit of speculative advantages would not present a proper case for its exercise. To preserve the property from all causes tending to its depreciation, to render it reasonably productive during the term it remains in the hands of the court, are objects proper for the attention of the court, and its hands should not be too rigidly tied in the pursuit of these objects. On the other hand, for the court to undertake to weigh the merits of projected improvements, and to assume in behalf of the parties in interest that class of experimental risks that appertain to the development of material industries, is both inconsistent with the nature of a court and the objects with which it holds assets for the satisfaction of creditors. . . .

"We are led by these considerations to conclude that before the order in question was made, as affecting the interests of parties not assenting to it, it should have been shown that some necessity existed for the change projected in the location of the line of the R. R., such necessity having relation to the production of the property or business of the road. No such case is presented. The advantages presented to the court, as likely to arise from the change, are of such a nature as to call for the exercise of business foresight and sagacity rather than prudence, for the formation of a judgment in regard to them. This is sufficient for the refusal of the order when objected to."

It often occurs that owing to the number of incumbrances upon the property, or the embarrassed state of the railroad company's affairs, the certificates if subsequent in lien to all other incumbrances would furnish little or no security to the lender. In many instances, therefore, they have been expressly ordered by the court to be prior in lien to all other incumbrances, mortgages, judgments and the like. The power of the court to make such an order has not been usually doubted. As a rule all parties in interest, including the various incumbrances, have joined in the application and have, therefore, been willing to submit to the decree of the court in the premises. Where, however, the right to enter such a decree is resisted by one of the incumbrances a very different question arises. In *Meyers v. Johnson*, 53 Ala. 237, the question received an elaborate consideration, and it was determined that the right existed, if the court saw proper, to postpone the lien of the objecting incumbrances to that of a certificate issued to raise money for the benefit of all interested. The ground upon which this conclusion was reached was substantially that adopted by marine courts in deciding cases on bottomry bonds and respondentia, viz., that he who advances the money which makes the security available for other incumbrances is entitled to priority over them, even though the time of their advances may antedate that of his own. The court also invoked the doctrine that the property, being in the hands of a court of equity, must be managed so as to subserve the interests of all concerned; and if this could, in the sound discretion of the court, be best effected by postponing the lien of mortgages, etc., to that of the certificates, that the powers to so postpone lay with the court.

The soundness of this conclusion is open to serious doubt. It is attacked with much vigor in two able articles, one entitled "On Postponing the Priorities of First Mortgage Liens," published in 18 Am. Law Rev. 40; and

the other entitled "Claims and Equities affecting the Priorities of Railroad Mortgages," 12 Am. Law Rev. 660. The current of authority is wholly opposed to it. The principle applicable in maritime cases is not extended to cases at common law. See in *Re Regent's Canal Iron Works*, L. R., 3 Ch. Div. 411. It has therefore been held that incumbrances placed upon a road to raise money to complete it have in themselves no priority over prior mortgages. *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; and so of mechanic's liens filed for construction of part of a railroad. *Dunham v. Cinn.*, Peru and Chic. R. R. Co., 1 Wall. 524; *N. J. Midland R. R. Co. v. Wortendyke*, 27 N. J. Eq. 658.

So, to come a little closer to the point at issue, receivers are sometimes directed by the court to pay to employees wages due at the time of the inception of the receivership out of the current income. *Douglass v. Cline*, 12 Bush, 608; *Newport and Conn. Bridge Co. v. Douglass*, 12 Bush, 678; and a lien on the personal effects of the company is often conferred by statute on such employees for a certain part of such wages. (See Act of N. J. Feb. 12, 1874; acts 1874, p. 12.) Such acts are never construed, however, so as to impair or postpone the lien of a prior mortgage. *Williamson v. N. J. Southern R. R. Co.*, 28 N. J. Eq. 277. Nor it would seem could any order of the court with reference to such wages give them such an effect. In *re Atlantic, Miss. and Ohio R. R. Co.*, 26 Fin. Chron. 444; *Denniston v. Chicago, Alton and St. L. Ry. Co.*, 4 Biss. 414. See also *Ellis v. Bost.*, Hartf. and Erie R. R. Co., 107 Mass. 1; *Iron and Steel Rolling Mill Co. v. Erie Ry. Co.*, 26 N. Y. Eq. 284. The fact may also be noted in this connection that a judgment recovered against receivers for injuries inflicted upon the plaintiff during their management of the road will have no priority over mortgages and other encumbrances which have been already placed upon it. These cases would seem to tend strongly to show that the decision in *Meyers v. Johnson* (*supra*) is not good law.

The question of estoppel raised in even the principal cases is not quite new, having been touched upon in some of the authorities already cited. It has, however, in the cases reported above first received systematic and careful consideration. In conclusion it may be remarked that the power of receivers to issue certificates depends wholly upon the terms of the order authorizing such issue, and that all purchasers of such certificates are bound to take notice of the terms of such order, and of the circumstances under which the certificates were issued. Where, therefore, the right to issue them was given only after the materials for which they were to be paid were furnished, and it appeared that they had been issued without consideration before such materials were furnished, they were held void in the hands of a bona fide purchaser for value.

See further on this whole subject *Jones on Railway Securities*, Sec. 533, seq., 12 Am. Law Rev. 660, and 13 Am. Law Rev. 40.

STATE OF TENNESSEE

v.

THE EDGEFIELD AND KENTUCKY R. R. CO. ET AL.

(6 *Lee's Reports (Tenn.)*, 853. *December Term*, 1890.)

Statutory receivers of railroads, to some extent, were public agents, and unless acting within the scope of their authority the State not bound by their acts.

Statutory receivers of railroads have no power to contract debts to be paid otherwise than out of the earnings of the roads.

There was no obligation on the State to continue the receivership until the current indebtedness of the receivership was paid.

The fact that the indebtedness created by the receiver enhanced the value of the property on which the State had a mortgage, cannot add strength to the claim.

A court of chancery, by its inherent powers, may enlarge the power of its receiver, but no such power exists as to a receiver by contract.

APPEAL from the Chancery Court at Nashville. McHENRY, Sp. Ch.

W. F. COOPER, E. H. EWING and W. B. REESE for complainant.

J. P. HELMS for defendants.

J. M. GAUT, Sp. J., delivered the opinion of the court.

Under the act of the General Assembly of the State of Tennessee, passed February 11, 1852, and subsequent acts either amendatory thereof or similar in character, the State of Tennessee extended its aid to the various railroad companies of the State, and among others, to the Nashville and Northwestern R. R. Co., and the Memphis, Clarksville and Louisville R. R. Co., by issuing to them the coupon bonds of the State, having thirty years to run, and bearing six per cent interest, payable semi-annually. One of the conditions of the grant, as fixed by the statutes, was that each company should pay into the State treasury, at least fifteen days before the interest became due, from time to time, upon said bonds, an amount sufficient to pay the interest upon the bonds issued to it, including exchange and commissions, or furnish evidence that such interest had been paid or provided for; and should also pay into the treasury an annual sum in State bonds, as a sinking fund, preparatory to the extinguishment of the principal. To secure the payment of the bonds and interest, a lien was reserved in favor of the State upon the respective roads, superstructures and equipments, both that prepared at the time the bonds were issued and that to be thereafter completed and furnished, which lien was expressly made superior to all others which the companies might create, and superior to all claims existing or to exist against said companies. As further security for the payment of the interest on the bonds, it was provided that, in case any of said companies should fail to pay the interest in accordance with the above stated provision, "the Governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same, and receive the rents, issues, profits and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the Governor may require, for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits and dividends, and pay over the same, under the direction of the Governor, towards the

liquidations of such unpaid interests," etc., and that "said receiver, so appointed, shall continue in the possession of said road, fixtures and equipments, and run the same, and manage the entire road until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest, as aforesaid, due on said bonds, which, being done, the receiver shall surrender said road and fixtures and equipments to said company." A like proceeding was also authorized in case of a failure to pay any installment of sinking fund. Both of the above named companies made default in the payment of interest, and were placed in the hands of receivers.

On the 21st of December, 1870, the General Assembly passed an act directing a bill to be filed in the chancery court at Nashville, in behalf of the State, against all the delinquent railroad companies, their respective stockholders, holders of the bonds, creditors, and all persons interested in the roads, to determine all questions which had arisen, or might arise, touching the rights and interests of the State, and also of said defendants, in said roads, with a view to a sale of the State's interest therein. Pursuant to this act, on the 20th of January, 1871, a bill, and on April 15, 1871, an amended bill, was filed by the State against said delinquent railroad companies by name, and by general description, under the rules of chancery practice, against all of their stockholders, bondholders, lien and general creditors, and all other persons having any interest in the roads.

The bill prays that, after the rights of all parties have been adjudicated, the State's interest in the roads may be sold, or the roads themselves, with all their property and franchises, if found necessary or for the interest of all parties, and expressly or tacitly assented to by such parties.

Under this bill such proceedings were had that, on the 6th day of July, 1871, the cause was finally heard as to the Memphis, Clarksville and Louisville road, and on the 8th of the same month as to the Nashville and Northwestern, when the State's lien was decreed to be superior to all others, the roads were ordered to be sold, and the proceeds applied to the respective debts therein ascertained to be due the State. From this decree no appeal was taken by any of the parties. In the mean time, however, on the 6th of June, 1871, these petitioners presented their petitions, asking to be permitted "to file them as defendants," and upon their application the order taking the bills for confessed was, as to them, set aside, they allowed to file their petitions, and "litigate the questions involved." In the decrees of July 6th and 8th above recited, the petitioners are ordered to file their claims within a given time, the master is ordered to report their amount, all questions of law and fact as to the same are reserved, and a sufficient amount of the proceeds of the sales of the roads to cover

them is ordered to be held subject to the future decree of the court.

The order of reference was executed, and in July, 1874, the cause was finally heard as to petitioners, upon a motion of the State to dismiss the petitions and a motion of the petitioners to confirm the report, when the chancellor allowed the former motion and disallowed the latter, dismissing the petitions with cost. From this decree petitioners have appealed.

The petitioners filed no answers to the original or amended bill. On the final hearing of the original cause, as above stated, their petitions seem to have been treated as answers, though they do not purport to answer the bills, and in fact allude to only a few of their allegations, and only to these by way of statement of the petitioners' cases.

On the other hand, the State, after treating the petitions as answers, undertook to treat them as bills, and moved to dismiss them, the motion, however, not specifying the ground on which it is based.

The propriety of this pleading and practice might be seriously called in question were it not for the justification which is perhaps furnished by the statute under which the bill was filed, which provides, "that, in the discretion of the court, formal pleadings may be dispensed with by a simple statement on the record of the points or matters relied upon by the parties and sought to be decided by the court." At all events, the argument in this court has invoked a decision on the merits, and we prefer to so dispose of the case.

The petition of A. Birchall and others avers that, under the internal improvement laws, the State had issued to the Nashville and Northwestern R. R. Co. a large amount in State bonds, upon which the railroad company was bound to pay the semi-annual interest as it fell due. That, upon default, the State had the right to appoint a receiver to take charge of the road, run the same, and out of the earnings, after paying the incidental expenses, to pay the interest on the bonds. That the receiver was authorized to employ the necessary labor and purchase the necessary materials. That, under the provisions of these laws, the Governor of the State, in September, 1867, placed the road in the hands of a receiver, and that it continued in the possession of and was run by successive receivers till September, 1869, when it was leased by the stockholders and the State to the Nashville and Chattanooga R. R. Co. That, under contract with said receivers, the petitioners did work and labor on said road, constructing, repairing and running the same, and furnishing cross-ties, wood and other materials necessary to its successful operation, and were to be paid out of the earnings of the road, but that, upon settlement, the receiver failed and refused to pay them for the labor or materials, but gave to some of

them certificates of indebtedness, and to others no evidence of the amount due. The amount claimed to be due each petitioner is specifically set forth. They aver that the work and labor was done and materials furnished while the road was in the possession of and being run by the State through the receivers, and that they were necessary for its successful operation. That the "complainant or the road is indebted to them in the just sums" set forth, and that "said road is and was insolvent at the time of the contracting of their claims against it." They further state, that they are advised that they have a lien, superior to all other claims or liens, against said road; insist that the statute authorizing the receivers to run the roads, and the express stipulation that they were to pay the expenses out of the proceeds of the same, together with their contract with said receivers, amounts to a contract. That the State and the stockholders having leased the road for a series of years to the Nashville and Chattanooga R. R. Co., and authorized that company to make "large expenditures in the construction and repairing of said road, to be allowed said lessees out of said road, placed it beyond the power of the complainant or the stockholders to pay your petitioners out of the proceeds and earnings of the road." That this action was in violation of the contract, and that they have a right to come into the court and ask an enforcement of said contract, and that the money owing them be paid out of the proceeds of the sale of the road, upon which proceeds they insist they have a lien. They further insist that, inasmuch as the complainant has filed a bill to sell the road, they have a right to come into court and ask that the same be paid out of the proceeds of the sale thereof.

The petition of Charles Briggs and others, creditors of the Memphis, Clarksville and Louisville R. R. Co., is substantially the same as that of Birchall and others, except that it contains no averment of leasing, and excepting, also, that it alleges that "for the past few years the earnings of the road had exceeded the incidental and running expenses, and that there was then a large sum of surplus earnings in the hands of the receiver. The petitioners pray, first, that they be paid out of that fund; or, second, if that fund be not sufficient, or be subject to superior liens, out of the proceeds of the sale, upon which they claim a lien; or, third, if the court should be of opinion that they have no lien on such proceeds, that the court will not let the title to the road pass until they are paid "out of the earnings of said road or otherwise."

It is admitted in argument by the solicitors for petitioners, that the allegation as to a fund in the hands of the receiver is a mistake. Moreover, it does not appear in the averments of the petition or elsewhere in this record that the State is claiming said fund, or in any way attempting to divert it from the payment of petitioners' claims. The receiver is a public agent: *Erwin v. Davenport*,

Sup. Court of Tenn. 1872; *Hopkins v. Connell*, December term, 1880. For any wrongs or defaults of its public officers or agents, the State is not responsible: *State v. Ward and Briggs*, 9 Heis. 120. On the other hand the receiver is a bonded officer, and, as such, is responsible to all parties aggrieved for any illegal diversion of funds received by him. We may therefore dismiss this feature from further consideration.

One position which seems to be assumed in the petition is, that the receivers being agents of the State, their contracts are the contracts of the State. This position, if true, would only make petitioners general creditors of the State. It would give them no rights whatever as against the property of the railroad companies. Nor would it give them any lien upon the property of the State. Their right to the fund in court, regarding it as belonging to the State, would only be the right which every creditor has, to appropriate to the payment of his debt, by due process of law, the property of his debtor. In this aspect of the case, their entrance into court would properly be, not as defendants in this suit, but as complainants in an original bill. Such a bill, however, they could not maintain because of the State's exemption from suit.

But the question of the State's liability to petitioners deserves further consideration. The receivers were undoubtedly, to some extent at least, public agents of the State. The State is not bound by the acts of her public officers or agents unless it manifestly appear that they are acting within the scope of their authority: *State v. Ward and Briggs*, 9 Heis. 125; *Floyd Acceptances*, 7 Wall. 680. The letter of authority to these agents was a public statute, of which everybody is bound to take notice: *Idem*. This statute provides that, upon the happening of the contingency, the receiver shall take possession of the road, "and run the same, and manage the entire road until a sufficient sum shall be realized, exclusive of costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid, due on said bonds, which being done, the receiver shall surrender said road and fixtures and equipments to said company." Authority to an agent to do an act usually carries with it authority to employ the usual and necessary means to accomplish it. This is because of the presumed intention of the principal. But where the principal restricts the agent to the use of certain means, he can employ no other. The receivers were authorized to run the roads. Was it usual and necessary, in order to do so, to create debts and charge them on the road by a lien superior to that of the State? Such expedients had not been usual, and it is very sure that they were not, in the minds of the Legislature, regarded as necessary. The statute assumes that the earnings of the road would be sufficient to pay the incidental expenses. At all events, it directs, as the petitioners themselves insist, that they shall be paid out of the earnings, and, under

a well known rule of construction, all other modes of payment are thereby excluded. The Legislature simply intended that the receiver should take the place of the company, and employ the same means which it employed. The object of the receivership was only to insure to the State a prudent and honest management of the road's finances, and the appropriation of its net profits to the payment of interest and sinking fund. Were the statute silent as to the means to be employed, the power on the part of the receiver to contract debts against the State to the extent of his ideas of necessity in operating a railroad, and secure their payment by displacing the State's statutory lien, is so dangerous a power that we would not be disposed to deduce it by implication. It must be presumed that if the Legislature intended such a power to exist, it would have been expressly conferred.

But it is insisted that the provision in the statute that the receiver shall run the road until a sufficient sum is raised, exclusive of costs and expenses, to pay the interest, amounts to an agreement on the part of the State not to terminate the receivership until at least the cost and expenses are paid; that the leasing of the Nashville and Northwestern road by her assent was a violation of the contract, and the offer to sell the Memphis, Clarksville and Louisville road was an attempt to violate it. The result to which this theory leads is, that if the costs and expenses are never paid, the receivership shall never terminate. That if the road will not pay running expenses, the contracting of the first debt which the receiver is unable to pay renders it obligatory upon the State to continue piling up such debts higher and higher, ad infinitum. This absurdity proves the theory incorrect. The receivership was provided solely for the benefit of the State, and the State had the right to terminate it at pleasure. We might, perhaps, conceive of a case in which it was terminated in such undue haste and under such circumstances as to operate as a fraud on those who contracted with the receiver in the meantime, but that is not the case. Innes, as receiver, took charge of the Northwestern road in September, 1867, and was succeeded by Cliff in 1868, who continued till the lease in September, 1869. Lewis took charge of the Memphis, Clarksville and Louisville road in 1865, was succeeded by Brown, and he by Henry, who continued in charge till the sale in 1871. Many of the claims of Birchall and others originated under Innes, and all of those of Briggs and others, except one, under Lewis, in 1867. Assuming, as we must, that the receivers did their duty, the roads did not pay running expenses, else petitioners' claims would not remain unpaid. The State seems to have made an honest effort to secure itself with the least detriment to the companies and their creditors. The experiment of receiverships, after a fair test, having proved a failure, they were abandoned. There is not the slightest probability that a continuance of the experiment would

have benefited petitioners. As the petitioners must be presumed to know the law, they contracted with the receivers, knowing that the earnings of the roads were their only means of payment, and that the State had the right to cut off this source at pleasure. They therefore assumed the risk of its adequacy and its continuance. It is, however, only the same risk which they would have incurred had the roads remained in charge of the companies.

This view of this question is sustained by High, in his work on Receivers, secs. 302 and 379. By petitioners' solicitors we are cited to *Fosdick v. Schall* and *Hale v. Frost*, 9 Otto, and *Meyer v. Johnston*, 53 Ala. 237. All of these are cases growing out of receiverships created by a court of chancery at the instance of mortgage bondholders. In *Hale v. Frost* the application was to pay out of the net earnings in the hands of the receiver, debts contracted before the receivership, for machinery and for materials for construction purposes. The mortgage covered not only the property of the company, but also its net earnings. The court allowed the claims for machinery, but disallowed that for materials for construction purposes, assigning no reason for the distinction, but simply referring to *Fosdick v. Schall*. The latter case was one in which a receiver hired of their owner cars which were necessary for the operation of the road, and paid the hire out of his receipts. The court holds that this was proper. This is all, as regards the point in question, that the case decides. There are dicta in the case which go some further. Chief Justice Waite, who delivers the opinion, says, that when it appears that the company has applied its current receipts, with which it should have paid current expenses, to the payment of interest or making of permanent improvements beneficial to the mortgagee, the court may, in appointing a receiver—which is not a matter of right, but one resting in the sound discretion of the court—exact as a condition that those current expenses shall be paid out of the profits of the receivership, and that whatever the court might have exacted in advance, it could require before surrendering the fund. But it is evident that the payment suggested, being one out of the income, would not postpone the mortgage lien. The mortgage, it is true, covered the income as well as the road itself, but it was only the net income. The debts in question were current expense debts, so that, by the very terms of the mortgage itself, enough of the income sufficient to pay them was exempted out of the mortgaged property. The only lien which would be interfered with, would be that equitable lien which the mortgagee had fixed upon the earnings by impounding them in the hands of a receiver. But this lien, in the view of the learned judge, was one which had been granted him as a favor from the court, in return for which it had a right to make exactions. Moreover, the state of facts supposed by the chief justice, is not shown to exist in this case. The damage accruing to the

roads during the war had been repaired chiefly, if not entirely, out of large loans made by the State, which had never been repaid. When the bill was filed, the Northwestern Company owed the State, upon a principal of \$3,222,000, funded and unfunded interest amounting to \$1,319,129; and the Memphis, Clarksville and Louisville Company, on a principal of \$1,582,000, was indebted for interest to the amount of \$871,525. *Prima facie*, says the court in *Fosdick v. Schall*, the fund in the receiver's hands belongs to the mortgagee, and the claimant must overcome the presumption.

Meyer v. Johnston, 53 Ala., for the very able opinion it presents, deserves and has received our careful consideration. Briefly stated, it decides that a court of chancery taking possession of property, through a receiver, pending litigation, has the power, in the absence of sufficient income, to charge the corpus with such expenses as are necessary for its custody and preservation; that the keeping of a railroad in repair and operating its trains are necessary for its custody and preservation, and also necessary for the public good. However much we may be impressed with the reasoning in that case, it is only necessary to say, that whatever may be the inherent powers of a court of chancery, independent of the will of the parties, as to receiverships created by it, a receivership outside of court, created by contract, must be controlled by the terms of that contract. Whenever the rights of the receiver's creditors are drawn in question, the contract, so far as it speaks, must be the law of the case. The public good, as well as the State's pecuniary interests, was a matter under the State's supreme control, and it had a right to contract with reference to either as it saw fit. Construing the contract as we do, it provided that the expenses of the road should be paid out of its earnings and not otherwise. If they proved insufficient, it can only be a matter of regret with the court as with the unfortunate creditors.

The claim for the relief sought by petitioners has sometimes been predicated upon the ground that the debt contracted by the receiver has enhanced the value of the mortgaged property. But this fact, if clearly shown, is not sufficient. This court held, in *Bird v. Bank of Tennessee*, 1 Sneed, 262, and *Pride v. Viles*, 3 Sneed, 127, that a mechanic who built a house upon mortgaged ground, under contract with the mortgagor, had no lien or equity superior to that of the mortgagee. And in the above cited case of *Meyer v. Johnston*, the chancellor had ordered the receiver to issue a large amount of certificates of indebtedness for the purpose of completing the road, and ordered that they be made a prior lien on the road, and paid first out of the proceeds of its sale. The court held, that however beneficial this might be to the mortgagees, it could not be done without their consent; that to permit it, would be to permit the impairing of the obligation of the contract.

Our conclusion is, that the petitioners are not entitled to the relief sought, and the petitions are therefore dismissed. The petitioners will pay the costs of this court, and the costs of the court below will be paid as decreed by the chancellor.

STATE OF TENNESSEE

v.

McMINNVILLE AND MANCHESTER R. R. Co. et al.

(6 *Lea's Reports, Tenn. December Term, 1880.*)

No appeal lies from a consent decree.

A statutory receiver of a delinquent railroad has no power to lease the road.

A payment of rents by the lessees, under a void lease, to an officer of the State, and the reception of such rents by such officer, would be no ratification of the void lease. The Legislature alone could ratify such void lease.

There can be no recovery for improvements made upon the road by the lessees under such void lease.

APPEAL from the chancery court at Nashville. McHENRY, Sp. Ch.

W. F. COOPER, E. H. EWING and W. B. REESE for complainant.
JOHN H. SAVAGE and J. P. HELMS for defendants.

J. M. GAUT, Sp. J., delivered the opinion of the court.

In the matter of Huggins and Price, stockholders and leases of the McMinnvill and Manchester R. R.

Under the internal improvement laws of the State of Tennessee, the State had issued its coupon bonds to the McMinnvill and Manchester R. R. Co., and the company having made default in the payment of interest and sinking fund, the road was placed in the hands of a receiver appointed by the Governor, under the provisions of the statutes. Subsequently, the company having continued in default, this bill was filed against said company and the ten other delinquent railroads, their stockholders and others, to have the State's interest in said roads ascertained and declared, and to sell that interest, or, with the consent of the companies, to foreclose the State's statutory lien by a sale of the roads themselves. Defendants, Huggins and Price, by petition, had themselves made defendants by name, and on the 2d of March, 1874, filed an answer, which they pray may be taken as a cross-bill, and into which they incorporated a demurrer. They state in the answer, that prior to the 19th of January, 1869, the railroad company had failed to pay the interest on the State bonds issued to it, and that under the provisions of the internal improvement laws, the road had been placed in the hands of D. E. Davenport, a receiver appointed by the Governor; that said

Davenport, upon consultation with, and consent of the Governor, Wm. G. Brownlow, had on the 19th day of January, 1869, leased the road to them, at an annual rental of \$15,000 for three years, which by a subsequent contract, made July 15, 1869, was extended to five years; that under this lease, they went into possession and so remained until November 29, 1869, when a bill was filed in the chancery court at Winchester, in the name of the railroad company and P. Marbury, its president and receiver, and under an injunction thereby obtained they were wrongfully dispossessed; that under a dissolution of the injunction they were restored, but were again dispossessed on the 23d of September, 1870, by an injunction granted under a pretended supplemental bill; that that case had been tried by the chancellor and was then pending in the supreme court. The further recitals in regard to that litigation it is not necessary to notice.

The respondents state that they are stockholders in said company as well as lessees of the road. They state that while they remained in possession they paid rent to the State at the rate of \$15,000 per annum, and that the State, by receiving said rent, ratified and confirmed the contract of lease. They insist that their right to the possession and control of the road for the time that their lease has to run, is superior to the claim of all other persons and especially the State of Tennessee, which has received their money and thereby ratified and confirmed the contract of the Governor and receiver. They state further, that they have made valuable and permanent improvements on the road, and that they are entitled to pay for them, whether restored to possession of the road or not.

The demurrer, as incorporated in the answer, assigns a number of causes, some of which go to the jurisdiction of the court, and the others set up the defence, that the State has no right to foreclose its statutory lien by a sale of the property, until the maturity of the bonds. The answer closes with a prayer that respondents' rights be respected and protected. The company made an agreed case with the State, which was reduced to writing and filed March 10, 1871. Among other questions, that of the jurisdiction of the court over the subject-matter is reserved therein.

On the 7th day of April, 1871, the cause was heard as to the Mc-Minnville and Manchester R. R. upon the bill, etc., and upon "the agreed case heretofore entered into between Messrs. E. H. Ewing, W. F. Cooper and W. B. Reese, solicitors upon the part of the State, and Messrs. A. S. Colyer and F. M. Smith, solicitors for the railroad company, president, directors and part of the stockholders, and upon the order pro confesso as to all other parties who have not entered their appearance, and upon the further agreement of the solicitors for the complainant and defendants, as appears in the latter part of this decree, when it appeared to the court," etc. After determining the indebtedness of the company to the State and de-

claring the State's lien on the property, it proceeds: "The defendants' solicitors insist that as a matter of law, the complainant cannot force the sale of the road for the payment of the bonds, or the decreed interest, until the maturity of the bonds, but it is agreed by the solicitors for the complainant and defendants, that it is to the interest both of complainant and defendants that the road should be sold, and the following agreement is hereby entered into between the solicitors aforesaid, to wit." Then is recited an agreement that the court, upon report of the clerk and master, shall fix a minimum price upon the property and franchises of the company, not to be less than \$300,000 in State bonds; that the company shall have the exclusive right for sixty days to purchase at that price; that in case the company fails to do so, then, to use the language of the decree, "it is agreed and hereby, with consent of parties to the case, ordered, adjudged and decreed, that B. J. Hill, W. S. Huggins and G. M. Stewart bc, and they are hereby authorized, as commissioners for so many of the stockholders of said company as may wish to take benefit thereunder, and consent to the same, including themselves, to purchase said road and property at the minimum fixed as aforesaid, within thirty days after the failure of the company to purchase. Upon the failure of the company or commissioners aforesaid for the stockholders, to purchase within ninety days, as aforesaid, then it is agreed that the commissioners may sell the same to the highest bidder, as contemplated by the act of December 21, 1870, upon the following conditions," etc. Then follow stipulations requiring the purchaser to operate the road. The decree proceeds: "It is therefore ordered, adjudged and decreed by the court, that the aforesaid agreement be carried out and executed by the commissioners of the State, and that said road be sold upon the conditions and restrictions agreed upon." . . . "And it further appearing that W. S. Huggins and James Price, claiming as lessees of said road, have been made parties to the bill and have answered the same, setting up their claim against said company and the State, and, whereas, it has been agreed by said Huggins and Price to refer all matters in dispute, by suits commenced or otherwise, in regard to said lease and the rights arising under it, to the arbitrament and award of one person to be chosen by each party, and a third person to be chosen as umpire in case of disagreement of the two, said umpire to be selected by the two referees, and that an award to be made by such referees shall determine and award whether Huggins and Price are indebted to the railroad company, or whether the company is indebted to them, and how much in either case, and that such award shall be binding upon the company and said Huggins and Price. Now it is agreed between the counsel of the State and the counsel of said Huggins and Price, John H. Savage, Esq., that the award so made shall be binding upon the State and upon the fund to be obtained by the sale of said road, if

the State is liable for any amount to said Huggins and Price on account of said lease, but the question of law as to the liability of the State to said Huggins and Price, or their right to any part of said fund, in consequence of any lease made to them, is expressly reserved. It is therefore ordered, adjudged and decreed, that the amount aforesaid to be reported by referees be taken as the amount of the claim of said Huggins and Price, if any, and the question of law aforesaid is expressly reserved for the future adjudication of this court."

We think the mere recital of this decree shows that, upon its face, it is a consent decree, in which the defendants, Huggins and Price, as stockholders, assent to the sale of the road. The only reservation is of their rights as lessees. And even as lessees they assent to the sale, with the understanding, however, that if the court should decide that as against the State they had a right to the possession and enjoyment of the property till the expiration of their lease, and consequently the right to resist the sale, this right, though not to be awarded them specifically, was to be compensated for out of the proceeds of the sale. As to their alleged rights as stockholders, there was no reservation whatever.

It is insisted, however, that these defendants consented to the sale only on condition that the minimum price should be fixed at \$250,000. As evidence of this, we are referred to a paper copied into the transcript. This paper does not purport to be a paper in the cause, is not marked filed, and is not referred to in any of the decrees. But if we are permitted to look to it, it shows an agreement to which the State is not a party. It is dated April 6th, 1871, and purports only to be an agreement between B. J. Hill, president and receiver, and Huggins and Price. It affords no evidence as to what agreement may have been made by their solicitors with the State upon the following day. The decree is, we think, a consent decree, which the appellants have taken no steps to set aside. As no appeal lies from a consent decree, the appeal as to it must be dismissed.

On the 11th of July, 1871, the questions of law reserved were heard, no steps having, in the mean time, been taken upon the agreement for an arbitration. The chancellor overruled the defendants' demurrer, decreed that the State's lien was superior to any right they might have, if any, as lessees, and that they had no lien upon the property or its proceeds. From this decree they have appealed.

The statute authorizing the appointment of receivers for delinquent railroads, does not expressly confer upon them power to lease the roads in their charge, but it is insisted that such power existed by implication. It is well settled that a railroad company has not itself the power to lease its road and other property; that such a corporation owes duties to the public, the discharge of which

it cannot, without express authority, relegate to another. *Thomas v. West Jersey R. R. Co.*, 10 Otto; *York, etc., R. R. Co. v. Winders*, 17 How. 30, and cases cited. If the company has no such implied power, it is difficult to see how the receiver, who temporarily assumes its functions, could possess it.

The statute states the purpose of the receiver's appointment to be to receive "the rents, issues, profits and dividends" of the road. It is insisted that this impliedly authorizes him to lease. But the same section of the statute, in prescribing his duties when appointed, says that he "shall continue in the possession of said road, fixtures and equipments, and run the same and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses of said proceedings, to pay off and discharge the interest as aforesaid due on said bonds, which being done, the receiver shall surrender said road and fixtures and equipments to said company." This command of the law, in effect, positively prohibits the transmission of the possession or control to other hands, and hence forbids a lease. That comprehensiveness rather than accuracy was aimed at, in the use of the words "rents, issues, profits and dividends," is well illustrated by the use of similar language in the answer of the appellants, where they claim the right "to the possession and control and management of said road and to receive the rents, issues and profits thereof."

This court expressed the opinion in the case of *McMinnville and Manchester R. R. Co. v. Huggins and Price*, 3 Baxt. 177, that Davenport, as receiver, had no power to make the lease, and a further examination of the question only convinces us that that opinion was correct. The defendants do not claim to have paid rent except for the time they remained in possession. It is not stated whether the money was paid to the receiver or the State of Tennessee. Inasmuch as it requires the same power to ratify that it does to authorize in the first instance, there is no department of the government, except the Legislature, which could have ratified it, and no act of that body is shown which it could plausibly be claimed amounts to a ratification. We are, therefore, of opinion that the contract of lease between Davenport, receiver, and defendants, was null and void and conferred on them no rights whatever.

But the defendants insist, that if not entitled to compensation for loss of their lease, they have a right to compensation for the improvements put upon the road. Persons holding possession of real estate in good faith, under color of title, are entitled to have the value of their permanent improvements set off against the rents and profits which the plaintiff may recover. Code, sec. 3261. Whether the right exists in the absence of any attempt to collect rents, we need not now determine. Defendants are conclusively presumed to know the receiver's want of authority to make the lease in question. They were in possession against the will of the

company and despite its efforts, by legal proceedings, to dispossess them. The State is not responsible for the unauthorized act of its officers.

We think it can hardly be said that they were holding possession in good faith under color of title. But it is conceded by defendants' counsel, as indeed it must be, that even if the lease were valid, it would be subject to the power of the State to determine the receivership, and thereby the lease, at pleasure. In this view of the case, the lessees were only tenants at will. But it has been often held that a tenant at will cannot recover for betterments. This court has gone even further, and held that a tenant for life has no such right. *Broyles v. Woodall*, 11 Heis. 39; *Hughes v. Peters*, 1 Cold. 70, and cases cited. The tenant voluntarily takes his chances of being permitted to enjoy the expenditures he has made upon the land of another.

The decree of the chancellor as to the questions reserved in the decree of April 7th, 1871, will be affirmed. The appellants will pay the costs of this court, and the costs of the court below will be paid as decreed by the chancellor.

J. C. WOOTERS

v.

INTERNATIONAL and G. N. R. R. Co.

(54 Texas Reports, 294. February 11, 1881.)

It is not necessary to set forth in the petition the minute details of a contract on which suit is brought, to authorize its introduction in evidence. It is sufficient if it sets forth the contract according to its true and legal import and effect, as a whole.

When suit is brought on a contract, which on its face refers to a contingency, on the happening of which the defendant should be discharged from liability, it does not devolve on the plaintiff to anticipate the defence, by averring that the contingency had not happened; but if the defendant relies on it as a defence, he must allege and prove that it did happen.

When parties reduce a contract to writing they are presumed to embody in it the terms and stipulations, as finally agreed to, and to which they mutually consented.

See statement of case for allegations in an answer in a suit on written contract, which, in the absence of an averment that the defendant was fraudulently induced to suppose that the written contract contained stipulations not embraced in it, was held bad on demurrer.

Declarations, representations and expressions of opinion, which precede, but do not enter into or form a part of the contract as finally consummated, furnish no ground for the recovery of damages to a party deceived or misled by them; for it is his own folly to rely on them when they are not embodied in and made a part of the contract.

A railway company obligated itself to locate its depot at the nearest practicable point within one mile of the court house. *Held—*

1. The word practicable was not used in the contract as synonymous with possible.

2. The road was only bound to locate its depot at the nearest point within one mile of the court house, at which it could be done at a reasonable and ordinary cost, with reference to all the circumstances under which it was to be done, and in view of the objects and purposes inducing the contract.

APPEAL from Houston. Tried below before the Hon. W. D. Wood.

Appellee brought suit in the district court of Houston county August 24, 1875, against appellant for \$1,000, on an alleged voluntary subscription agreement of appellant to pay the H. and G. N. R. R. Co. (afterwards consolidated with the Int. R. R. Co.) that amount of money, on condition that the company would run its road through Houston county and erect a depot as near the court house at Crocket as practicable, and within one mile. Appellant pleaded a general denial, and also specially set up failure of consideration, etc.

The court sustained appellee's demurrer and exceptions to the answer. Verdict and judgment for appellee for \$1,546.66, principal and interest.

The written agreement states the consideration thus: "For and in consideration of the enhanced value to be given and which is contemplated to arise to our lands and other property by the location and speedy construction of the H. and G. N. R. R., and for the further consideration of one dollar to each of us in hand paid." The condition is, "if the aforesaid railroad company shall on or before the first day of May, 1873, build its railway and run its cars to the north or northeastern line of Houston county, and establish and have a depot as near the court house as practicable, and not to be more than one mile from said court house."

The agreement contained a proviso to the effect, that if Houston county should issue bonds to the railroad company in the sum of \$25,000, payable in twenty years, the agreement should be regarded as cancelled and discharged. Objection was made to reading the agreement, on the ground that the petition failed to charge that the contingency qualifying defendant's liability had never occurred.

The answer ruled out on demurrer and exceptions, besides a general denial, set up, in avoidance of the subscription, substantially the following facts: That before the agreement was signed the company had run lines of survey locating its line and a depot at a distance of a mile or more from the court house, and avowed its intention to establish a depot at such distance from Crocket, with the fraudulent intent and purpose to induce the citizens of that town to pay it money and property to have the road constructed and a depot established nearer the court house; that the subscriptions by defendant and others were made with the view of having a depot located at the nearest practicable point to the court

house, which is in the center of the public square, in order to preserve the town and keep its business on and near the public square, as was well known to said company; that defendant and other subscribers owned property on the public square, and it was considered by them that the location of the depot near the court house would enhance the value of their property, as well as prove of great convenience to the public; that before and at the time defendant subscribed the agreement, the president and chief engineer of the H. and G. N. R. R. Co., and other officers and agents of the company, stated to defendant that the depot would be located at a point about two hundred yards from the court house, and that said point was a practicable one for the depot, which representations were fraudulently made to induce said subscription; that the company fraudulently induced defendant and others to subscribe the agreement on the avowed intention of the company and its authorized officers and agents, who were then engaged in the construction of the road and soliciting said subscriptions, that the company would establish the depot at or about said point; that the consideration and inducement to the citizens to subscribe to the agreement was, that the depot should be located at or about said point as the nearest practicable point to the court house; that instead of locating the depot at said point which is convenient to the business portions of the town, convenient of access, etc., the company fraudulently and against the protests of said subscribers, including defendant, located the depot at a greater distance, to wit, one thousand yards from the court house, and at a point inconvenient of access, there being a branch and ravine between the depot and the public square; that the company, after having secured subscriptions to the agreement, including defendant's, on the faith of the representations that the depot would be established at the point mentioned, fraudulently purchased land where the depot was and is located, and laid off lots, etc., and attempted to build up a new town called "New Crocket;" that the company by its president and chief engineer and other officers and agents, before and at the time of the subscriptions, falsely and fraudulently induced defendant to believe that the depot would be located at or about said point, and said subscription was made by defendant on the faith of the acts and declarations of said officers and agents who solicited and obtained said subscriptions, that the depot would be located at said point, and that the same was a practicable point for the location of the depot; that said officers and agents, before and at the time of said subscriptions, represented to defendant and other citizens that said point was a practicable one, and that the most practicable location for the depot nearest the court house was within two hundred or three hundred yards, and at or near said point east of a branch, and fraudulently held out to defendant and the citizens, and promised them in consideration of their subscriptions, that the depot would be located at or about said point

and within two hundred yards of the court house; and it was by reason of such statements and conduct of said officers and agents, that defendant subscribed said agreement, and defendant acted on said declarations, and was induced thereby not only to subscribe said agreement, but also to purchase property near said point on the faith of such location of the depot, and that same would enhance the value of his property, and was thereby damaged in the sum of two thousand dollars; and that in violation of said promises, and contrary to its declarations and representations, the company fraudulently located its depot about one thousand yards from the court house and at an inconvenient point, with the intent and purpose to impair the value of the property of defendant and the other subscribers situated on and near the public square, and whereby defendant's property was greatly depreciated in value.

Appellee demurred generally, and assigned as special exception that the answer, "so far as it sets up verbal statements and other matters occurring at the time or before the signing the bond or subscription list, are insufficient in law to make a defence; and further, the defendant thereby seeks to vary the written contract between the parties thereto."

J. R. Burnett, for appellant.

Nunn & Williams, for appellee.

MOORE, C. J.—If the petition was defective, as appellant insists, for want of a proper averment of a consideration for his subscription upon which the action is founded, objection should have been taken to it by demurrer or exception. It is too late to attempt to do so after verdict by motion in arrest of judgment. *Trammell v. Trammell*, 20 Tex. 416.

The law does not require the contract or agreement, upon which an action is brought, to be set out in the petition in every minutia to authorize its introduction as evidence. The petition is sufficient if it sets forth the contract according to its true and legal import and effect as a whole. This appellee did, and had appellant made objection to the reading of the subscription in evidence, when offered by appellee, it should have been overruled. It appears from the bill of exceptions, however, that there was no objection made to the evidence on the trial below, but the objection really made was the failure of appellee to set out the proviso to the subscription, to the effect that the contract of the subscribers should be satisfied and discharged, in the event the county of Houston should issue to appellee its bond to the amount of twenty-five thousand dollars. If the contingency had occurred which relieved appellant from performance of his undertaking, it devolved upon him to allege and prove it, and it was not incumbent upon appellee to anticipate his defence by averring that the county had not issued to appellee its bonds.

In our opinion the court did not err in sustaining appellee's exceptions to appellant's answer. It is not pretended that appellant did not know and fully understand the terms and conditions of the written contract or agreement into which he entered, that he was fraudulently induced to suppose that it contained other stipulations than what it did. Whatever may be said upon the subject prior thereto, it is an elementary principle that when parties reduce a contract to writing, they are presumed to embody in it the terms and stipulations as finally agreed to, and upon and to which they mutually contract. Appellant sought in his answer to show that appellee, by the declarations and representations of its officers and agents, had agreed and undertaken to fix its depot at a different place from that at which it was subsequently located, or that appellant was induced by these representations and declarations to believe that the depot would be thus located, and that appellee was thereby estopped from locating the depot where it did. To permit these propositions to be established by parol testimony would be to vary and set aside a written contract by parol testimony, which evidently cannot be done. *Jackson v. Stockbridge*, 29 Tex. 398.

It is absurd to suppose that the parties would have been guilty of the folly of entering into a written contract which, seemingly, gave appellee the privilege of locating its depot at the nearest practicable point within a mile of the court house, or that appellee would have incurred the expense of running different lines to ascertain this point, if it was already bound to locate it, as claimed by appellant. Declarations, representations and expressions of opinion, which precede, but do not enter into or form a part of the contract as finally consummated, furnish no ground for the recovery of damages to a party deceived or misled by them, for it is his own folly to rely upon them, when they are not embodied in and made a part of the contract. The exceptions, therefore, to appellee's claim for damages, even if a legitimate answer to an action such as this, were properly sustained.

It is somewhat difficult, if we look merely at the extracts from the charge of the court embodied in appellant's assignment of error, to understand the precise point of his objection to it. If we properly understand it, however, it is this, to wit: The court did not instruct the jury, as appellant insists it should, that appellee was bound by the contract upon which it sued, to locate its depot at the nearest possible point to the court house at which it could be placed, without reference to the cost or expense of doing this. This, however, in our opinion, is not a fair or just construction of the contract. Appellee stipulated to locate its depot at the nearest practicable point, within one mile of the court house. Now it certainly needs no engineering skill or knowledge to know that the nearest possible point at which this could be done without regard

to cost, would be the nearest point to the court house at which land for this purpose could be purchased or condemned. If this was what was intended, it was idle for appellee to have stipulated that the point at which it would establish its depot should be not more than a mile from the court house. Plainly the word "practicable" was not used in this contract as synonymous with "possible," but was used and understood by the parties to this contract in its usual and ordinary sense, as binding appellee to locate its depot at the nearest point within a mile of the court house, at which it could be done at a reasonable and ordinary cost, with reference to all the circumstances under which it was to be done, and in view of the object and purpose inducing the contract. By this instruction the question of law upon which the case turned was, we think, fairly and correctly submitted to the jury. And the evidence justified and warranted their verdict. The judgment is affirmed.

Affirmed.

THE BALTIMORE AND OHIO RAILROAD COMPANY v. GEORGE W. KOONTZ, ADMINISTRATOR OF WILLIAM A. WRIGHTMAN, DECEASED.

SAME v. MONROE FUNKHOUSE, ADMINISTRATOR OF CHARLES L. NOEL, DECEASED.

SAME v. MONROE FUNKHOUSE, ADMINISTRATOR OF REUBEN E. HAMMON, DECEASED.

(*Advance Case United States Supreme Court. October 31, 1881.*)

A corporation of one State by carrying on business in another State, e. g., by leasing the property and franchises of a corporation of that other State, does not thereby become a citizen of that other State.

Therefore a Maryland railroad company which leases and operates the property of a Virginia railroad company does not thereby become a citizen of Virginia, or lose its right to a removal of the cause when sued in a Virginia State court.

In a removal cause the jurisdiction of the Federal court attaches as soon as it becomes the duty of the State court to proceed no further; and the entry of the record in the Federal court is necessary simply to enable that court to proceed with the cause, but not for the transfer of jurisdiction.

If the party petitioning for a removal is kept in the State court against his will and forced into a trial, he may remain in the State court, carry his case up regularly until he obtains a reversal of the judgment and an order for the allowance of the removal, and then enter his case in the Federal court, notwithstanding the fact that, pending these proceedings, the first term of the Federal court after the filing of the petition for removal had elapsed, and the party petitioning for removal had not filed his copy of the record at that term.

ERROR to the Supreme Court of Appeals of the State of Virginia.
 Hugh W. Sheffey, John K. Cowen, and E. J. D. Cross, for plaintiff in error.

Moses Walton and J. R. Tucker, for defendants in error.

WAITE, C. J.—These cases are substantially alike, and present the following facts:

The Baltimore and Ohio R. R. Co. was incorporated by the State of Maryland on the 28th of February, 1827, to build and operate a railroad from Baltimore, in Maryland, to some suitable point on the Ohio River. By the terms of the charter the annual elections of directors were to be held in Baltimore. On the 2d of March following the State of Virginia granted the company the same rights and privileges in Virginia that had been granted to it in Maryland, except that no lateral road could be built in Virginia without the consent of the Legislature, and the road was not to strike the Ohio at a point lower than the mouth of the Little Kanawha. Under this authority from the two States a road was built from Baltimore to Wheeling, in Virginia. When the State of West Virginia was formed it took from Virginia all the territory occupied by the road in that State, and from that time no part of the original line has been within the present State of Virginia.

On the 20th of August, 1873, the Baltimore and Ohio Company took a lease from the Washington City, Virginia Midland and Great Southern R. R. Co., a Virginia corporation, of all the railroad of the last-named company lying between Strasburg and Harrisonburg, in Virginia. Under this lease the Baltimore and Ohio Company took the exclusive possession of and operated the leased property, using for that purpose the powers and franchises of the Virginia corporation. While so operating the leased road an accident happened to one of the passenger trains, by which the several persons whose administrators are defendants in error in these cases lost their lives. These suits were brought in a State court of Virginia, under a statute of that State, to recover damages for the deaths of the persons named by the alleged wrongful acts of the company. Each of the administrators suing was a citizen of Virginia.

On the 2d of September, 1876, which is conceded to have been in time, the company filed its petitions in the State court for the removal of the cases to the Circuit Court of the United States for the Western District of Virginia, the proper district, on the ground that the company was a citizen of Maryland and the several plaintiffs citizens of Virginia. The plaintiffs answered the petition in each case, denying that the company was a citizen of Maryland, and claiming that for all the purposes of these suits it was a citizen of Virginia. After hearing, the State court refused to recognize

the removal, because, as was held, by leasing and operating the road of the Virginia corporation under the Virginia charter the company became, for all the purposes of that business, a citizen of Virginia. To this ruling exceptions were taken in due form and made part of the several records.

It nowhere appears that copies of the records in the State court have ever been entered in the Circuit Court, but on the 19th of December, 1876, the company asked and obtained from the State court leave to plead, and in due time thereafter pleas of not guilty were put in. One case was tried in the State court on the 6th of April, 1877; another on the 10th of April, 1878, and the other on the 9th of December afterwards. Judgment was given in each case for the plaintiff. The company was represented at the trials, and exceptions of various kinds were taken. The causes were all carried to the Supreme Court of Appeals of the State, where the judgments were affirmed. The records show distinctly that errors were assigned on the rulings upon the petitions for removal, and that the decision was adverse to the company. The cases are now here on writs of error to the Supreme Court of Appeals, and the questions presented for our consideration are: 1. Whether a case for removal was made by the company; and 2. If it was, whether, as it does not appear affirmatively that copies of the records have been entered in the Circuit Court, the company has lost its right to have the judgments reversed for the original errors in that behalf?

The Court of Appeals in Virginia held, as early as 1855, in the case of the Baltimore and Ohio R. R. Co. v. Gallahue's Administrator, 12 Gratt. 655, that the Baltimore and Ohio Company could be sued in Virginia, and in the course of the opinion said that the effect of the enabling act of Virginia was to make the company a Virginia corporation as to its road within the territory of Virginia. Afterwards, in 1870, this court decided, in R. R. Co. v. Harris, 12 Wall. 65, that the company could be sued in the District of Columbia, into which a lateral road had been built with the consent of Congress, given through an enabling act much like that of Virginia. In that case we held the company to be a Maryland corporation only, and that no new corporation had been created by the enabling act either of Virginia or the District of Columbia. The ruling in the Virginia case was followed by the Supreme Court of Appeals of West Virginia in the cases of Goshorn v. The Supervisors, 1 W. Va. 308, and the Baltimore and Ohio R. R. Co. v. The Supervisors, 3 Id. 319, both of which were decided before R. R. Co. v. Harris in this court. That question is, however, unimportant here, as it is conceded that the part of the road originally in Virginia is now in West Virginia, and that the company no longer uses in Virginia any of the franchises conferred by the enabling act of that State. Neither the Court of Appeals nor

counsel here make any claim on account of that legislation. Even conceding that the company was once a Virginia corporation so far as its original road in that State was concerned, the most that can be said of it now is that, in common with all citizens of the old State residing on the ceded territory, its citizenship was transferred by the organization of West Virginia from the old State to the new. Consequently, if it was once a corporation of Maryland and Virginia, it is now a corporation of Maryland and West Virginia. Any citizenship it may have had in Virginia has been lost.

It is not contended that this enabling act gave the company a right to lease another Virginia road and operate it as a lateral road, nor that in running the leased road the company uses any of the franchises conferred by the original grant. The present claim is that, by using the franchises of another Virginia corporation to run its leased road, it made itself a corporation of Virginia, for all the purposes of that business, just as the lessor was and is.

It is well settled that a corporation of one State doing business in another is suable where its business is done, if the laws make provision to that effect. We have so held many times. (*Lafayette Ins. Co. v. French*, 18 How. 404; *R. R. Co. v. Harris*, supra; *ex parte Schollenberger*, 96 U. S. 369.) This company concedes that it was properly sued in Virginia. What it asks is that, being sued there, it may avail itself of the privilege it has under an act of Congress, as a corporation of Maryland, and remove a suit which has been begun into the proper court of the United States exercising jurisdiction within Virginia. The litigation is not to be taken out of Virginia, but only from one court to another within that State. So that the single question presented is whether, by taking a lease of the road of a Virginia corporation, the Maryland corporation made itself also a corporation of Virginia, for all purposes connected with the use of the leased property?

It is not denied that the Maryland company derived all its power, so far as the operation of the Virginia road was concerned, from the Virginia corporation, nor that, in respect of the business of that road, it must do just what was required of the Virginia corporation by the laws of Virginia; but that does not, in our opinion, make it a corporation of Virginia. It may be sued in Virginia because, with the implied assent of that State, it does business there; but, as we said substantially in *Schollenberger's* case, the question of suability and jurisdiction is not so much one of citizenship as of finding. If a citizen of one State is found, for the purposes of the lawful service of judicial process, in another, he may ordinarily be sued there. A citizen of Maine may be sued in California if he happens to be there in person and the proper officer serves him personally with the lawful process of a California court. He is still a citizen of Maine, although, in the exercise of one of the privileges of a citizen of the United States, he has been

found in California. An individual may, without asking permission of State authorities, do business where he pleases, and if a citizen of one State he is entitled to all the privileges and immunities of citizens of the several States. (Const., art. 4, sec. 2.) Not so with corporations. Their rights outside the State under the authority of which they were created depend primarily on their charters. If the charter allows it they may exercise their chartered privileges and carry on their chartered business in any other State which, by express grant or by implication, permits them to do so. They have no absolute right of recognition in any other State than their own (*Paul v. Virginia*, 8 Wall. 168), and the State which recognizes them can impose such conditions on its recognition as it chooses, not inconsistent with the Constitution and laws of the United States. If they are recognized and permitted to do business without limitation, express or implied, they carry with them wherever they go all their chartered rights, and may claim all their chartered privileges which can be used away from their legal home. Their charters are the law of their existence, and are taken wherever they go. By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad.

In this case a Maryland corporation leased the railroad and the franchises of a Virginia corporation. Neither State Legislature acted specially on the subject, so far as the record discloses. The Maryland corporation assumed the right to take, and the Virginia corporation to grant, the lease which lies at the foundation of the rights of the parties. Under this lease possession was given and taken without objection from the authorities of either State, and the Maryland corporation actually uses the franchises of that of Virginia. The question, therefore, presented to us is not one of *ultra vires*. No complaint is made that Maryland has never given its corporation the right to go to Virginia and take a lease, nor that Virginia has never authorized its corporation to grant such a lease. For all the purposes of these cases we must assume that the Maryland corporation is rightfully using the leased road, and with the consent of both States.

We can hardly believe if an individual a citizen of a State other than Virginia went into that State and leased the property of a Virginia corporation, to use as the corporation did, it would be claimed that he made himself thereby a citizen of Virginia within the meaning of the Constitution and laws of the United States. Citizenship in this connection has a special signification. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. (Amend. 14, sec. 1.) A corporation may, for the purposes of suit, be said to be born

where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by and organized under the laws of a particular State, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that State, possessing all the rights and having all the powers its charter confers. It cannot migrate nor change its residence without the consent, express or implied, of its State, but it may transact business wherever its charter allows, unless prohibited by local laws. Such has been for a long time the settled doctrine of this court. "It must dwell in the place of its creation, and cannot migrate to another sovereignty," "but its residence in one State creates no insuperable objection to its contracting in another." (*Bank of Augusta v. Earle*, 13 Pet., 520.) With a long line of authorities in this court to the same effect before us, we cannot hesitate to say, with all due respect for the Court of Appeals of Virginia, that the Maryland corporation, by taking a lease from the Virginia corporation, with the unconditional assent of Virginia, of a railroad which could only be operated by the use in Virginia of the corporate franchises of the lessor, did not make itself a corporation of Virginia, or part with any of the rights it had under the Constitution and laws of the United States as a corporation of Maryland. The State of Virginia has not granted to it any special powers or privileges beyond allowing it to transact its corporate business in Virginia. Its powers within the State come from its Maryland charter and the Virginia corporation. That corporation had certain franchises and privileges which it held by grant from its State. These franchises and privileges were a species of property which, we must presume for all the purposes of this case, it had the right to allow the corporation of another State to use. The Virginia authorities have impliedly assented to all that has been done. This assent having been given and the contract entered into between the companies, all Virginia can now require is that the Maryland company, in carrying on its business under the contract and using the franchises of the Virginia company, shall be subject to all obligations which the charter imposes on that corporation. The Maryland corporation simply occupies the position of a company carrying on an authorized business away from its home, with the consent of its own State and of that of the State in which its business is done. For these reasons we must hold that the Court of Appeals erred in deciding that the removal of the suit to the Circuit Court was properly refused because the company, by taking the lease and using the road in Virginia, became, for all the purposes of that lease, a corporation of Virginia.

The only remaining question is whether the company can now

claim a reversal of the judgments below on account of this error, since it does not appear that copies of the records in the State court have been entered in the Circuit Court. The State court of original jurisdiction directly decided, in accordance with the claims of the several defendants in error, that upon the showing made the company was not entitled to a removal, but must remain and defend the suits in that court. It was conceded on the argument that if the judgment had been rendered before the first day of the next term of the Circuit Court of the United States there could be a reversal, if the case was in fact removable. The position of the defendants in error seems to be, that as the company appeared and went on with the causes in the State court after the next term in the Circuit Court, without showing that the copies of the records had been entered in that court, it in effect waived its right to a removal, and submitted itself again voluntarily to the jurisdiction of the State court.

We have uniformly held that if a State court wrongfully refuses to give up its jurisdiction on a petition for removal and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. (*Insurance Co. v. Dunn*, 19 Wall. 223; *Removal Cases*, 100 U. S. 475; *Railroad Co. v. Mississippi*, 102 U. S. 141.) It is also a well-settled rule of decision in this court, that when a sufficient case for removal is made in the State court the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored. (*Gordon v. Longest*, 16 Pet. 104; *Kanouse v. Martin*, 15 How. 209; *Insurance Co. v. Dunn*, *supra*; *Railroad Co. v. Mississippi*, *supra*.) The entering of the copy of the record in the Circuit Court is necessary to enable that court to proceed, but its jurisdiction attaches when, under the law, it becomes the duty of the State court to "proceed no further." The provision of the act of 1875 is in this respect substantially the same as that of the twelfth section of the judiciary act of 1789, and requires the State court, when the petition and a sufficient bond are presented, to proceed no further with the suit; and the Circuit Court, when the record is entered there, to deal with the cause as if had been originally commenced in that court. The jurisdiction is changed when the removal is demanded in proper form and a case for removal made. Proceedings in the Circuit Court may begin when the copy is entered. Such is clearly the effect of the cases of *Gordon v. Longest* and *Kanouse v. Martin*, where it does not appear that the record was ever entered in the Circuit Court. In *Insurance Co. v. Dunn* and *Railroad Co. v. Mississippi* the records were entered, but no point was made of this in the opinions. We are aware that in *The Removal Cases*, *supra*, and *Kern v. Huidekoper*, 103 U. S. 490, it is said, in substance, that after the petition for removal and the entering of the record the jurisdiction of the Cir-

cuit Court is complete ; but this evidently refers to the right of the Circuit Court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction. The State court must stop when the petition and security are presented, and the Circuit Court go on when the record is entered there, which is in effect docketing the case. The question, then, is whether, if the State court refuses to let go its jurisdiction and forces the petitioning party to trial, he must, in order to prevent his appearance from operating as a waiver, show to the State court that he is not in default in respect to entering the record and docketing the cause in the Circuit Court on the first day of the next term following the removal ?

As has just been seen, when the State court has once lost its jurisdiction it is prohibited from proceeding until in some way jurisdiction has been restored. The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. If, after a case has been made, the State court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error, the case is sent back to the State court with instructions to recognize the removal and proceed no further. Such was, in effect, the order in *Gordon v. Longest*, supra. The petitioning party has the right to remain in the State court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the State court is going on. This was actually done in *The Removal Cases*. When the suit is docketed in the Circuit Court the adverse party may move to remand. If his motion is decided against him he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court and direct that the suit be sent back to the State court, to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. (*Babbitt v. Clark*, 103 U. S. 106.) If in such a case we reverse the order of the Circuit Court to remand our instructions to that court are—as in *Relfe v. Rundle*, 103 U. S. 222—to proceed according to law, as with a pending suit within its jurisdiction by removal. Should the petitioning party neglect to enter the record and docket the cause in the Circuit Court in time, we see no reason why his adversary may not go into the Circuit Court and have

the cause remanded on that account. This being done, and no writ of error or appeal to this court taken, the jurisdiction of the State court is restored, and it may rightfully proceed as though no removal had ever been attempted.

It is contended, however, that if the petitioner fails to enter his record and docket his cause in the Circuit Court on the first day of the next term the jurisdiction of that court is lost, and there can be no entry on a subsequent day. Such we do not understand to be the law. The petitioner must give security that he will enter the record on that day, but there is nothing in the act of Congress which prohibits the court from allowing it to be entered on a subsequent day, if good cause is shown. In *The Removal Cases*, supra, we used this language: "While the act of Congress requires security that the transcript shall be filed on the first day of the next term, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction if, by accident, the party is delayed until a later day in the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected." This was as far as it was necessary to go in that case, and in entering, as we did then, on the construction of the act of 1875, it was deemed advisable to confine our decision to the facts we had then before us. Now the question arises whether, if the petitioning party is kept by his adversary, and against his will, in the State court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter his cause in the Circuit Court notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered. We have no hesitation in saying that in our opinion he can. As has been already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the State court. The entering of the record in the Circuit Court after that was mere procedure, and in its nature not unlike the pleadings which follow service of process, the filing of which is ordinarily regulated by statute or rules of practice. The failure to file pleadings in time does not deprive the court of the jurisdiction it got through the service of process, but inexcusable delay may be good ground for dismissing the cause for want of prosecution. So here, if the petitioning party, without sufficient cause, fails to enter his record and docket his cause, the suit may be properly remanded for want of due prosecution under the removal; but if sufficient cause is shown for the delay there is nothing in the statute to prevent the court from taking the case after the first day of the term and exercising its jurisdiction. Clearly it is within the judicial discretion of every court, on good cause shown, to set aside a default in filing pleadings on a statutory rule day, and allow the

omission to be supplied. This case seems to be analogous to that. Undoubtedly promptness should be insisted on by the courts of the United States, and no excuse should be accepted for delay in entering a record after removal, unless it amounts to a clear justification, or a waiver by the opposite party. It seems to us manifest that if the petitioning party is forced by his adversary to remain in the State court until he can, in a proper way, secure a reversal of the order which keeps him there, the requirement of the law for entering the record in the Circuit Court at any time before the reversal actually takes place must be deemed to have been waived, and that for all the purposes of procedure in that court the time when the State court lets go its jurisdiction may be taken as the time according to which the docketing of the cause is to take place. Certainly the petitioning party ought not to be required to carry on his litigation in two courts at the same time. He may do so if he chooses; but if he elects to go on in the State court after his petition for removal is disregarded, and take his chances of obtaining a reversal of any judgment that may be obtained against him because he was wrongfully kept there, he ought not to be deprived of a trial in the proper jurisdiction because of the unwarranted act of his adversary, or of the State court.

The judgment of the Court of Appeals in each of these cases is reversed and the causes remanded to the Supreme Court of Appeals of Virginia, with directions to reverse the judgments of the Circuit Court of the county and transmit the cases to that court with instructions to vacate all orders and judgments made or entered subsequent to the filing of the several petitions for removal and approval of the bonds, and proceed no further therein unless its jurisdiction be restored by the action of the Circuit Court of the United States, or this court.

Reversed.

WILLIAM B. SCOTT

v.

THE MIDDLETOWN, UNIONVILLE AND WATER GAP R. R. Co.

(*Advances Case, New York. October 4, 1881.*)

In an action to recover the value of certain railroad iron bought for defendant and used in an extension of the company's track, without protest or dissent from the board of directors. *Held*, The directors using the material purchased were bound to inquire, and presumed to know, whether it was paid for or not, and it was not essential to an adoption of the act of the officer that the directors should know the terms of his contract. A witness having been examined on the cross-examination as to new matter, not growing out of the testimony he had given, it was proper to endeavor to refresh

his memory and correct his recollection by producing and showing to him his own letters relating to the subject-matter of the inquiry. Letters from the general office of the company, and written by its secretary, in reference to the iron were admissible as part of the *res gesta*.

LEWIS E. CARR for appellant.
J. W. CULVER for respondent.

FINCH, J.—That the president of the defendant corporation had no authority derived from his official position to incur the liability sought to be enforced; and that no express and formal action by the Board of Directors conferring such authority was shown, was conceded in the charge of the court to the jury, and in the approval of that charge by the General Term. By both tribunals the plaintiff's right of recovery was put upon the ground that the iron bought by the President was used in an extension of the company's track, without protest or dissent from the board of directors, who acquiesced in, and thereby ratified the original purchase. The general rule is not here disputed, but the contention is that such ratification could not occur without knowledge by the directors of the terms of the contract, or at least, of the fact that the purchase was upon the credit of the corporation. But there were no terms of the contract, except what the law implies from the acceptance of property sold, which is that the vendee will pay the value. There was nothing else to know; no other fact remained; the only terms of the contract were those implied by the law, which the defendant was bound to know. The more plausible suggestion, which, perhaps, to some extent involves the other, is, that the vendee who ratifies only does so when his use of the purchased article is with knowledge that it was bought on his credit. But it is difficult to see how we can avoid assuming that the company had such knowledge, or, at least, how a jury could resist such natural and necessary inference. There is the iron being laid in the company's track, and appropriated to the company's use. What must a director looking on necessarily understand? Evidently that such iron is sold to the corporation, or given to it, or loaned for its use. The supposition of a gift or loan would be so unlikely and improbable in the absence of any such actual existing fact that he could hardly avoid understanding a sale to the company upon its credit. The fact of the delivery of the iron, and its appropriation and use by the corporation for its proper and ordinary purposes with his knowledge and assent, is some evidence that the directors knew of its sale to the company, and justifies such inference by the jury, especially in a case where there is proof of a sale in fact intended, and no shadow of evidence of either a loan or a gift.

It is argued, however, that such directors might, under peculiar circumstances, have the right to suppose that the iron was furnished upon the credit of some other person or corporation, and

that such peculiar circumstances existed in the present case. Still, if there was no gift or loan the suggestion only changes the inference as to who is the vendor entitled to receive payment, and not the inference that he who appropriates and uses the property does so with a knowledge that he must pay its fair value to the real owner. The circumstances relied upon as justifying the supposition were also shown to have occurred after the delivery and acceptance of the iron, and so could not have affected the inference to be drawn. The lease to the Oswego Midland, by which that company assumed the funded and floating debt of the defendant, was dated May 24th, 1871, and finally executed on the 30th of that month. The plaintiff swears that all the iron was delivered before the execution of that lease. In any point of view, therefore, there was evidence in the case tending to prove a ratification, and which warranted such a conclusion by the jury.

These views indicate the grounds of our opinion, that the motion for a non-suit was properly denied, and that the court correctly charged that if the defendant received the property bought by its president, and converted it to the use of the corporation, and used it for the corporate purposes for which the material was designed, that would be an adoption and ratification of the act of the officer, and that the directors using the material purchased were bound to inquire and presumed to know whether it was paid for or not; and also that the court properly declined to charge that it was essential to an adoption of the act of the officer that the directors should know the terms of his contract.

The remaining questions in the case relate to the admission and rejection of evidence.

James N. Pronk, the secretary of the defendant corporation, was called as a witness on its behalf. On his direct examination he testified only to the signatures to the lease executed to the Oswego Midland, and to the payment by that company, alone or in connection with the New Jersey Midland, of the cost of grading the extension of the defendant's track. On his cross-examination new matter was broached, not growing out of the testimony he had given. In the course of such cross-examination he testified that, so far as he knew, the defendant did not procure any iron from any source to lay the extension. He was then shown four letters, written by him as secretary of the company to Culver, the vendor of the iron, which showed that he did know that Culver was to furnish the iron to the defendant. These letters, after having been shown to the witness, were offered in evidence, were objected to as incompetent and immaterial, the objection overruled, and an exception taken. Treating the witness, so far as the new matter inquired about was concerned, as a witness for the plaintiff, it was nevertheless proper to endeavor to refresh his memory and correct his recollection by producing and showing to him his own letters

relating to the subject-matter of the inquiry. While they were written after the negotiations of Culver with the defendant's president, they were also written partly before the delivery of the iron had commenced, and partly during the process of its delivery. They purported to come from the general office of the company, and the writer was its secretary. We think the letters were admissible as part of the *res gestæ*. (*Wild v. N. Y. and Austen Silver Mining Co.*, 59 N. Y. 644.) The secretary was an agent of the corporation, writing the letters in the usual course of business, and in the performance of official duty. The first letter, written in April, 1871, declares the writer's knowledge that Culver was to furnish the iron for "our track," and urges that it be promptly forwarded to prevent "our contractor" from losing his men after the grading should be finished. The next, written in the last of the month, expresses a fear that the iron has been wrongly shipped. The third, written on the 1st of May, again reminds him of the iron, and recites the anxiety of "our contractor" to close his work. And the last, dated on the 24th of May, directs that any supplies "for our Unionville extension" may be consigned as before. These letters, therefore, related to current events, to business then in progress, to the delivery and the use of the iron in question, and are not at all open to the criticism of the appellant as being subsequent declarations, or recitals of past events.

Other exceptions argued before us were founded upon the rejection of evidence offered to show the transactions between the New Jersey Midland and the Oswego Midland with reference to the iron in question, and the assumption and payment of the claims of the former company by the latter. The offers were to show entries in the accounts of the two companies referred to, indicating a charge of the iron by one, and its allowance by the other. Such entries were not evidence against the plaintiff, and the transaction was wholly between third persons. The foundation fact sought to be reached did not go far enough to affect or contradict plaintiff's title. Culver says that he bought the iron of the New Jersey Midland. His title is not destroyed or his right to recover of his vendee affected by such later transactions. It is suggested that the New Jersey Midland was Culver's agent, and payment to the agent might be shown. There was no such agency. The New Jersey Midland was Culver's vendor, having no authority except to deliver the iron as the latter directed. It is further argued that the evidence was admissible as bearing upon the understanding of the directors of the defendant corporation in making use of the iron. But the lease was not made until after the whole or some part of the iron was laid, and the alleged settlement between the New Jersey Midland and the Oswego Midland was still later. How could these subsequent events in and of themselves affect the prior understanding of the defendant's directors?

Other considerations affecting the case generally were very elaborately argued. We have given them due attention, but have failed to find any just reason for the reversal of the judgment. It should be affirmed with costs.

All concur.

PHILADELPHIA AND READING R. R. Co.'s APPEAL.

(Advance Case, Pennsylvania. March 6, 1893.)

A railroad company has the power, without any specific authority being conferred by the charter, to accept a perpetual loan and to issue irredeemable bonds to the lenders.

A railroad company authorized by Act of Assembly to issue such bonds, at such prices and in such manner as it sees fit, but without further express power to borrow money, proposed to raise a fund by issuing \$50 irredeemable bonds at the rate of \$15 each, to bear interest at the rate of six per cent on their face value, payable out of the earnings after defraying current expenses and distributing a dividend on the stock, said bonds to be entitled to share *pari passu* with the common stock in any surplus revenues of the company. A. B. contracted with the company to purchase such bonds. Subsequently, upon A. B. tendering the purchase money, the company refused to issue to him the bonds for which he had subscribed, on the ground that their issue was beyond the chartered powers of the corporation. A bill being filed by A. B. against the company for specific performance of the contract: *Held*, that the company could validly issue such bonds, that they were not usurious in their nature, and that therefore complainant was entitled to the relief prayed for.

APPEAL from the Common Pleas of Berks County.

Bill in equity between Joseph L. Stichter, complainant, and the Philadelphia and Reading R. R. Co., defendant.

The bill averred as follows:

The company defendant was duly incorporated as a railroad company, with all the powers and rights incident thereto. Its president and managers had power, by virtue of an Act of Assembly, "to secure such issues of bonds as they might deem advisable to make, bearing such rate of interest, with or without provision for the payment of taxes on the said bonds, and payable at such times as the president and managers might provide, by mortgaging from time to time the whole or any part of its railroads, real and personal estate, and corporate rights, and franchises acquired and to be acquired, and might dispose of the said bonds at such prices and in such manner as they should determine."

They were bound to declare dividends at least twice in every year. By its by-laws the company had empowered its board of managers to devise and carry into execution any agreements and contracts which they might consider calculated to promote the interests of the company.

In the month of May, 1880, the said company became unable to pay its current debts and obligations, and on bills in equity, filed by certain holders of its mortgage bonds in the Circuit Court of the United States, receivers were appointed to take charge of its property and conduct its business pending proceedings upon the said bills. (See *McCalmont v. Philadelphia and Reading R. R. Co.*, 3 Am. & Eng. R. R. Cas. 163.)

The said company was at the time indebted in a very large amount of money, and although its property and assets were of great value, there was imminent danger of their being sacrificed. Decrees of foreclosure or sale were threatened under the bills in equity aforesaid, and a vast amount of personal property, consisting mainly of stocks and bonds of various descriptions and of great value which had been pledged as collateral security for the payment of a so-called "floating" or unfunded debt of about \$10,000,000, was subject to the risk of ruinous sacrifice at forced sale. The market price of the stock fell as low as seven dollars per share, and the bonds and certificates of the company's indebtedness, unsecured by mortgage, were greatly depreciated, and even the bonds secured by the last two mortgages could not be sold except at a heavy discount.

The liabilities of the company to creditors amounted to about \$110,000,000, and the capital stock, at the par value of fifty dollars per share, exceeded the sum of \$35,000,000.

Under these circumstances the president and managers determined to ask the stockholders and bondholders to contribute a sum sufficient to pay the floating debt, regain possession of the collateral securities, and put the company again in the possession of its property, in consideration of the company's agreeing to pay yearly a certain percentage on the sum advanced, in case the surplus earnings, after paying interest on debt, and six per cent dividend on stock, should be sufficient for the purpose. It was thought that an arrangement by which such surplus earnings should be made available for the purpose of paying the debts of the company and restoring its property to the stockholders was not only advantageous to the latter, but that it was the simplest and most effective way to enable the company to resume its business and devote its earnings to the payment of its debts.

In furtherance of the plan or scheme thus adopted, the said company defendant and the receivers aforesaid presented to the said Circuit Court of the United States for the Eastern District of Pennsylvania a petition embodying the scheme and praying for a decree of the court sanctioning the same.

The following was the decree which was entered:

"And now, November 18th, 1880, upon filing the petition of the Philadelphia and Reading R. R. Co. et al.,

"It is ordered and decreed by the court that the prayer of the

said petition be granted, and that the said The Philadelphia and Reading R. R. Co. be and is hereby authorized and empowered to enter into the proposed agreements for the guarantee of the proposed subscription and issue of deferred income bonds, and to execute and issue under the seal of the said company \$34,300,000 of such deferred income bonds, on which interest is to be deferred to a dividend of six per cent on the common stock of the said company, and thereafter to take all revenues up to six per cent, and then to rank *pari passu* with the common shares for further dividend, said right to this participation in the surplus revenues of the company to take effect as of December 1st, 1880.

"The said deferred income bonds to be issued at 30 per cent of the par value, or \$15 per bond, payable in installments, as proposed in said petition, and before selling or disposing of said bonds in the market, the privilege or option of taking a pro rata share to be first offered to the stockholders of the said company, and whatever money shall accrue from said issue or guarantee shall be received by the receivers, and be applied by them to the payment of the floating debt of the company, and the redemption of the securities pledged therefor."

In pursuance of this decree a prospectus was issued announcing the issuing of the deferred bonds and that each shareholder would be entitled to subscribe for fifty dollars of said issue in right of each share of stock held by him.

The following was the form of the bonds proposed:

"PHILADELPHIA AND READING RAILROAD COMPANY.

"DEFERRED INCOME BONDS.

"TOTAL ISSUE, \$34,300,000.

"This is to Certify, That

of
entitled to dollars
of the Deferred Income Bonds of the Philadelphia and Reading R. R. Co. Transferrable only upon the books of the said company in person, or by attorney duly authorized according to the rules established for that purpose and on surrender of this certificate.

"This certificate is one of an issue of \$34,300,000, all of which issue are irredeemable and are entitled to interest up to six per cent, only after a dividend of six per cent in each year shall have been paid on the common shares of the said company, and thereafter the right of this issue of Deferred Income Bonds to further interest shall rank *pari passu* with the declaration of further dividends upon the common shares of the said company.

"Witness the seal of the corporation and the signatures of the president and treasurer, at Philadelphia, this day
of A. D.

The complainant, being a shareholder of the corporation, signed a form of subscription for \$50,000 of said bonds, in right of 1000 shares in said company held by him, and he averred that thereby

he had concluded a binding contract with said company to issue said bonds to him.

Said company had, however, complainant averred, failed on tender by him of the amount subscribed to issue to him the bonds. (The reason of this was the revocation by the Circuit Court of the decree authorizing the scheme and the entry by it of an injunction restraining the company from issuing the bonds, on the ground that such issue was beyond the company's chartered power. See *McCalmont v. Philadelphia and Reading R. R. Co.*, 3 Am. & Eng. R. R. Cas. 163.)

Complainant then further averred that at a corporate meeting of the company defendant a majority of the stockholders had approved the deferred bond scheme, and that he was without adequate remedy at law for the failure of the company defendant to issue the bonds subscribed for by him. He therefore prayed for a decree of specific performance whereby the corporation defendant should be ordered to issue to him the \$50,000 in bonds to which he had subscribed.

To this bill defendant demurred on the ground that it had no legal right to execute and issue the bonds. The court, in an opinion by HAGENMAN, P. J., entered a decree overruling the demurrer and granting the relief prayed for, whereupon the company defendant took this appeal, assigning for error the entering of the decree.

GEO. F. BAER, for the appellant, relied on the opinion of McKENNA, Ass. J., reported in *McCalmont v. Philadelphia and Reading R. R. Co.* (3 Eng. & Am. R. R. Cas. 163.)

James G. Gowen, for the appellee.

PARSONS.—We are in no doubt as to the power of the Philadelphia and Reading R. R. Co. to issue the "deferred income bonds" described in this bill. So far as the mere borrowing of money is concerned, it is not necessary to look into the character of the company for a grant of express powers. It exists by necessary implication. "As a general proposition, the right of private or trading corporations to issue promissory notes, bonds, or other evidences of indebtedness, unless restrained by their charters or the law of the land, may be conceded.

The reason is plain. Such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing of obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect." (*City of Williamsport v. The Com.*, 3 Norris, 487; see also *Reinboth v. Pittsburg*, 5 Wright, 278; *Watt's Appeal*, 28 P. F. S. 370.) I will not pursue the subject further; it would be a waste of time.

There being no objection therefore on the ground of want of

power, is there anything in the form of the transaction to render it ultra vires? We learn from the pleadings that in May, 1880, the company failed and passed into the hands of receivers; that at the time of such failure it had a floating or unfunded debt of upwards of \$10,000,000; that a large amount of property, mainly stocks and bonds of great value, had been pledged to secure said debt; and that said stocks and bonds were subject to the risk of being sold at forced sales at a great sacrifice; that the president and managers of the company, in order to pay this floating debt, and thereby regain possession of the collaterals, determined to ask the stockholders to contribute \$10,000,000 for such purpose, for which they proposed to give them \$34,300,000 of deferred income bonds on which interest is to be deferred to a dividend of 6 per cent on the common stock of the company, and thereafter to take all revenues up to 6 per cent, and then to rank *pari passu* with the common shares for further dividend.

It will thus be seen that the stockholder who advances \$15 receives a bond for \$50, which is irredeemable, and which is not entitled to interest until after 6 per cent has been paid upon the common stock. The objections that have been made to this scheme are twofold:—First, that it is usurious; and, second, that the transaction is not a borrowing of money, but the issuing of a deferred stock, which is beyond the power of the company.

It is sufficient to say in regard to the first objection that as the interest on the "deferred income bonds" is payable only upon a contingency, the contract is not usurious. Non constat that the company will ever pay anything to this class of bondholders. The contingency which will entitle them to interest may never arise, and is reasonably certain to be postponed for a considerable period. There is, therefore, no contract for the payment of more than legal interest. It is settled law that where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious. *Spain v. Hamilton* Adme I. Wallace, 604; *Lloyd v. Scott*, 4 Peters, 205. This point does not need elaboration.

The second objection is equally without merit. The bonds in question are not deferred stock either in form or substance. They are certificates of indebtedness under the seal of the company, with a recital that they are irredeemable; that they are entitled to no interest until after the common stock has received 6 per cent, and after that to come in *pari passu* with said common stock. They more nearly resemble a perpetual loan, with the interest indefinitely postponed. The holders would certainly have no right as stockholders.

It is urged, however, that this transaction is not a borrowing of money within the implied powers of the company; that the meaning of the word "borrow" as applied to moneyed transactions

involves an obligation to return the sum or thing borrowed. This is a narrow view of the subject. It is true we often use this word in the sense of returning the thing borrowed in specie, as to borrow a horse. But it is not limited to this sense.

Among the definitions given by Webster are the following:—First, "To take or receive from another on trust, with the intention of returning or giving an ex-equivalent for," and, second, "to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume." We need not give the apt illustrations with which the learned lexicographer adorns his text. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time, it is not always nor necessarily so. The object of loaning money is to obtain a return in the way of interest. The interest is the consideration for the loan, the hire or price which is paid for the use of it. If I agree to pay \$60 for the use of \$1000 for one year it is a borrowing of money. It is equally so if I contract at the same rate for the use of it for ten years. Is it any the less so when the contract is perpetual and the loan irredeemable? The equivalent is paid annually in the shape of interest.

We do not think trading corporations any more than individuals are restricted in their moneyed transactions to the narrow meaning of the word "borrow." In its broader sense it implies a contract for the use of money. The terms of the contract are within the control of the contracting parties so long as they keep within the law. I see no legal objection to a contract for a perpetual loan. Such contract implies the voluntary advance of a sum of money, repayment of which is not to be demanded, presumably for some benefit or advantage to the lender. Such transactions are common in England, and are not unknown in this country. They are referred to in *Union Canal Co. v. Antillo*, 4 W. & S. 556, and in the appeal of the Zoological Society, 38 Legal Intelligencer, 403, and I am informed that the annuity bonds of the Lehigh Valley R. R. Co. are irredeemable. So long as the company pays the interest the principal is not demandable. If the Reading R. R. Co. may not accept money from its stockholders as a perpetual loan, I am unable to see how it could accept it as a gift.

It is to be observed that the borrowing of money is not the exercise of a corporate franchise, or a power that is denied to the citizen. Where a corporation seeks to exercise its franchises, as when it attempts to take private property for public use by virtue of the Commonwealth's right of eminent domain, we have a case in which if the right is not expressly given it is denied.

We have the question remaining whether the contract should be enforced in this proceeding. The bill was filed by a stockholder of the Philadelphia and Reading R. R. Co., setting forth the failure of the company, the existence of a large floating debt referred

to, and that in order to pay this floating debt the president and managers "determined to ask the stockholders to contribute a sum sufficient for such purpose in consideration of the company agreeing to pay yearly a certain percentage on the sum advanced, in case the surplus earnings after paying interest on debt and 6 per cent dividends on stock should be sufficient for the 'purpose.'"

The bill then set forth the details of what is referred to as the "deferred bond scheme;" that bonds to the amount of \$19,655,000 have been subscribed for by the shareholders, and the residue by the bondholders of the company; that a sum exceeding \$1,850,000 has been paid to the receivers on account of said subscription; that the stockholders of the company, by the vote of a large majority, have approved of the plan; that the complainant, who is the holder of a thousand shares of the stock, subscribed for and bound himself to take and pay for his quota of said stock, viz., bonds to the amount of \$50,000, but that the company has failed and refused to perform its part and issue said bonds, although the plaintiff tendered full and complete performance on his part of the contract. The prayer of the bill is for specific performance.

The company demurred to the bill upon the single ground that the plaintiff had not by said bill shown that said company had a legal right to execute and issue the bonds referred to, and further elected to abide by its demurrers.

As a general rule, a Court of Equity will not enforce specifically a contract relating to personalty. The reason is that, for the breach of such contract an action at law furnishes an adequate remedy. *McGowin v. Remington*, 2 Jones; *Foll's appeal*, 10 Norris, 434; *appeal of the Zoological Society*, 38 *Legal Intelligencer*, 403.

We need not discuss the question how far an action at law would be an adequate remedy for a breach of this contract, nor to what extent the plaintiff would be injured by the refusal of an insolvent corporation to accept his money. The case presents other questions of higher importance.

If this were in point of fact an adverse proceeding, and the defendant company were resisting the enforcement of this contract, we would hesitate to make a decree. But the proceeding, whatever may be its form, is evidently an amicable one for the purpose of settling the legal rights of the parties.

In this respect it closely resembles an amicable action with a case stated. The demurrer admits all the facts alleged in the bill, and suggests only the supposed illegality of the "deferred bond scheme," with a declaration of submission to the ruling of the court. That the plain object of the proceeding is to obtain the decree of this court upon the validity of the bonds is not an objection in view of the fact that the case is a bona fide one, with the real parties having

an actual present interest. And we can see substantial reasons why this question should be put at rest by the decision of a court whose decree shall be final. The property of the Reading R. R. Co. is of enormous value, and its development enters largely into the business and prosperity of the city of Philadelphia and State at large.

Unless some relief can be speedily afforded by which its large unfunded debt can be liquidated, the interests of stockholders, and to some extent of bondholders, must be sacrificed. The ruin of such a property would be a public calamity, the extent of which is difficult to measure. The "deferred bond scheme" was intended to meet this difficulty. We have nothing to do with its wisdom. That is a matter which concerns only those whose interests are to be affected by it.

It is enough for us to know that it comes to us with the approval of the president, the board of managers, and a large majority of the stockholders of the company. As we are unable to see that it conflicts with any rule of law or public policy, we will not be astute to find reasons for refusing a decree, particularly as no question has been raised as to the jurisdiction. And even if there had been, the act of assembly which expressly confers upon Courts of Equity the supervision and control of corporations would be ample.

If, as the bill avers and the demurrer admits, the stock and bondholders of this company are willing to advance the sum of \$10,000,000 to save this valuable property from ruin, we see no sufficient reason why they should not be permitted to do so.

It would not be difficult to demonstrate that it might be their interest to make such advance, even if the money were donated. That they have reserved the chance of getting some of it back in the future in the shape of interest does not detract from the legality of the scheme.

The decree is affirmed and the appeal dismissed at the cost of the appellants.

Dissenting opinion by *MERCUR*, J.:

I am constrained to dissent from the judgment of the majority of this court. I consider it fraught with mischief reaching far beyond this particular case. It not only affirms the existence of a power not found in its charter, but one in clear conflict with the general law of the Commonwealth.

A corporation is the mere creature of the law. It cannot exercise any powers other than those expressly conferred or necessarily implied in furtherance of the object of its creation. All powers not so given are withheld. It is not sufficient that the officers or a majority of the stockholders of a private corporation believe its interests may be advanced by the exercise of additional powers. What the Commonwealth has not given to it can only be obtained

by virtue of legislative action. Power manifestly doubtful should never be recognized by judicial construction. If not given by plain words or by necessary implication we should declare it not to exist. *Bank of Pennsylvania v. Commonwealth*, 7 Harris, 144. (*Pennsylvania R. R. Co. v. Canal Commissioners*, 9 Harris, 9, *Commonwealth v. Franklin Canal Co., Id.*, 117. Same *v. Erie and Northeast R. R. Co.*, 3 Casey, 389; *Spahr v. Farmers' Bank*, 13 Norris, 432.)

Whether this be simply a scheme to create and sell the "deferred income bonds" described in the bill, or whether, as seems to be the fact, it be a device to borrow money from partial friends at an exorbitant rate of interest, a Court of Equity should not lend its aid in furtherance of either object. No specific power to create and dispose of such bonds is found in the charter. It is contended that it arises under an implied power to borrow money; that the whole scheme is made lawful under this implied power. The claim here, however, does not stop with the assertion of a power to borrow money at a legal rate of interest. It is blended with the enforcement of an agreement that for each \$15 borrowed the corporation shall pay interest on \$50; in other words, shall pay 20 per cent in trust on all money so borrowed.

This is the specific contract which we are called on to enforce. Not that the company may voluntarily pay this usurious interest; but by decree of this court shall pay. It is intimated, however, that the company will probably never be able to pay this interest, and this decree will be harmless. Such intimation rests on some assumed principle of equity that I am free to confess I do not understand. If the scheme be so uncertain of ever yielding any return, it is one of gambling, to which the hand of a Chancellor should never be extended.

The attempt is gravely made to maintain the agreement of the company that a corporation, like a natural person, may carry on its legitimate business by all legal and necessary means not prohibited by law or its charter. We may concede all this, yet the question before us is whether it may inaugurate business not legitimate, and carry it on by illegal means prohibited by law and by its charter. Can it truthfully be said the charter ever contemplated that the corporation should agree to pay 20 per cent interest to such of its stockholders as see proper to lend it money, and then arrange with a person with whom this agreement was made to procure a decree enforcing specific performance of the contract?

In case of a private partnership composed of many persons, if a majority of them should agree to borrow money for the purpose of carrying on the business of the firm, and to pay 20 per cent interest therefor, it would not for a moment be contended that one lending the money could either at law or in equity compel the firm to pay that usurious interest. The attempt here is not to

give to a corporation powers equal to those of natural persons to make a binding contract, but much greater powers. The restrictions heretofore recognized as applicable to the powers of a private corporation are to be disregarded by the affirmance of this decree. I therefore dissent.

Justices Gordon and Sterrett concur in this opinion.

The questions raised in this case were partly discussed in the note appended to the report of *McCalmont Bros. v. Phila. & Reading R. R. Co.*, 8 Eng. R. R. Cases, 168. The authorities there cited were, however, chiefly as to the power of the court to enjoin the issue of the bonds and not as to the question of the right of the corporation under its charter to issue them. This is the point which in the following note will be chiefly touched upon.

A corporation has of course no other powers than those conferred by its charter, either expressly or by implication. *Thomas v. R. R. Co.*, 11 Otto, 82, and cases there cited. But in determining what powers are conferred by implication, it is necessary to consider what the purposes of the corporation are. Such powers will be presumed to have been impliedly granted as will enable it to carry out those purposes. *Cumberland Valley R. R. Co. v. Baab*, 9 Watts, 460; *Dana v. Bank of U. S.*, 5 W. S. 238; *Phila. & Sunbury Ry. Co. v. Lewis*, 9 Casey, 87.

Business corporations have usually the power to borrow money, whether that power be expressly conferred by their charter or not, for such a power is a necessity of their existence. *McMasters v. Reed's Ex.*, 1 Gr. Cas., 36; *Com.*, ex rel. *Rambooth, v. Pittsburg*, 5 Wr. 284; *Watt's appeal*, 78 Penn. St. 391; *R. R. Co. v. Jackson*, 77 Pa. St. 321; *White Water Canal Co. v. Valletta*, 21 How., 424; *Barry v. Mch't's Bank*, 1 Sand. Ch. Rep. 280; *Curtis v. Leavitt*, 1 N. Y. 68; 2 Kent's Comm., 278; *Ang. & Ames on Corp.* 83; *Shrewsbury and Bingham R. R. Co. v. N. W. Ry. Co.*, C. H. of L. Cas. 112.

They may too clearly issue certificates or evidences of such indebtedness, stipulating such terms and conditions of payment as they may deem proper. *Scottish N. E. R. Co. v. Stuart*, 3 McG., 382; *Taylor v. Chichester & Med. Ry. Co.*, L. R., 2 Exch. 356; *Bateman v. Mayor of Ashton under Lyne*, 3 H. & N., 323; *New Eng. Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 586; *Trustees, etc. v. Brooklyn F. I. Co.*, 19 N. Y. 311; *Brady v. Mayor*, 1 Barb. 590; *Shrewsbury & Bingham R. R. Co. v. N. W. Ry. Co.*, 6 H. of L. Cas. 112; *Hercules Mutual L. Ass. Soc.*, 6 Ben. 37; *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 525; *Miller v. N. Y. & Erie R. R. Co.*, 8 Abb. Prac. 481; *Jones on Railroad Securities*, Sect. 313.

In one principal case it will be observed that the corporation's right to issue the bonds in question did not depend solely on this implied power. It had also an express power conferred upon it by an act of assembly to issue bonds. The complainant's counsel urged in support of the contention that the power to issue the bonds in controversy was reposed in the company the fact that similar irredeemable bonds had previously been issued under somewhat similar circumstances and without objection. See *Union Canal Co. v. Antello*, 4 W. & S. 556; *Appeal of the Zoological Society*, 38 Leg. Int. 403.

The decision of the circuit court of the U. S. to the effect that the issue of these bonds was ultra vires the corporation was clearly not binding on the court. On the contrary along line of decisions might be cited to show that the United States courts should follow the State court in their adjudications upon this point, the question in dispute being the construction of a State statute. *City of Richmond v. Smith*, 15 Wall. 439; *Leffingwell v. Warren*, 2 Black. 599; *U. S. v. Morrison*, 4 Pet. 194; *Green v. Neal's Lessee*, 6 Pet. 291; *Walker v. Commissioners*, 17 Wall. 648; *Christy v. Pridgeon*, 4 Wall. 208; *Shelby v.*

Guy, 11 Wheat. 367; Pork v. Ry. Co., 4 Otto, 164; Ottawa v. Perkins, 4 Otto, 260.

Moreover the suit in the United States court was not between the same parties as this controversy. *Empire v. Darlington*, 101 U. S. 87; *Brooklyn v. Ins. Co.*, 99 U. S. 362.

Whether the case was a proper one for the application of the remedy of specific performance may be seriously doubted. It will be observed that the court dismisses this question by the observation that the action is an amicable one to settle the rights of the parties. Still consent can scarcely confer jurisdiction. The general principle is clear that courts of equity will not decree specific performance of contracts for the sale of personality, where a breach of the contract can be compensated for in damages. *Mechanics' Bank v. Seton*, 1 Pet. 299; *Phillips v. Berger*, 2 Barb. 608; *McGarvey v. Hall*, 23 Cal. 140; *Pusey v. Pusey*, 1 L. C. in Eq. 320, and cases cited.

But where the breach cannot be compensated in damages, or where the damage suffered cannot be ascertained, there specific performance may be decreed. This is the case where the subject of litigation is the stock of a particular company, because here the measure of damages is uncertain and incapable of adjustment. *McGowin v. Remington*, 2 Jones (Pa.), 56; *Ducroft v. Albrecht*, 12 Som. 189; *White v. Schuyler*, 1 Abb. Pr. (N. S.), 300; *Finley v. Aikens*, 1 Gr. Cas. 98; *Ball v. Coggs*, 1 Bro. P. 888; *Columbine v. Chichester*, 2 Ph. 27; *Poole v. Middleton*, 7 Jur. N. S. 1262; *Shaw v. Fisher*, 2 DeG. & Sm. 11; *Wynne v. Price*, 3 DeG. & Sm. 310; *Ferguson v. Paschall*, 11 Mo. 267; *Todd v. Taft*, 7 Allen, 371; *Treasurer v. Commercial Co.*, 23 Cal. 390; *Ashe v. Johnson*, 2 Jones Eq. 189; *Odessa Tramways Co. v. Wendel*, L. R., 8 Ch. Div. 235. See also *Ry. Co. v. Stewart*, 5 Otto, 279. It was upon these cases that complainant in the principal case relied.

It may be well to remark in conclusion that the decision in the principal case was made under peculiar circumstances. The complainant and the corporation demurrant were both equally anxious to have a decree entered which would decide the validity of the so-called "deferred bond schema." Hence the corporation practically left the case undefended, the counsel retained by it relying exclusively upon the opinion of the U. S. Circ. Ct. in *McCalmont Bros. v. Phila. & Reading R. R. Co.* This circumstance should be taken into account in determining the weight to be attached to the present decision. See *McCalmont v. Phila., etc., R. R. Co.*, 3 Am. & Eng. R. R. Cas. 168.

CARLOS LAVIOSA

v.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO.

(*Advances case, Louisiana. 1881.*)

When, by municipal legislation, the erection of sheds or awnings over the public streets, in a particular manner, is prohibited, sheds or awnings not constructed in the manner forbidden, are not nuisances.

Courts will not take judicial cognizance of municipal legislation. Its existence must be proven, as any other fact.

A railroad company cannot, of its own authority, demolish such a shed or awning, simply because it obstructs the use of its track.

Where a railroad company provokes the deed and furnishes the labor necessary for its accomplishment, the fact that the demolition of such a shed or awning was ordered without lawful authority, by one municipal officer, and

done under the superintendence of another, does not make the railroad company less an actor in the wrong and responsible as such.

A municipal corporation cannot treat a particular thing as a nuisance, without general legislation declaring all things of its kind to be such.

A railroad company may be compelled to use the streets in such a manner as to inflict the least possible injury upon private individuals, compatible with the reasonable convenience of the public who make use of its road.

The courts will afford a remedy against the use of streets, by railroads, in a manner that is needlessly and unreasonably injurious to private persons, even though such particular mode of use is expressly authorized by municipal legislation.

APPEAL from the Fifth District Court, Parish of Orleans, Rogers, Judge.

Bentinck Egan for plaintiff, appellant; L. E. Simonds for defendant.

The opinion of the court was delivered by Thomas Gilmore, Esq., attorney at law, sitting in the place of Rogers, Judge, recused, having sat in the case below.

GILMORE, J.—This is a suit to recover four hundred dollars, as damages, for the alleged wrongful act of the defendant in tearing down an awning erected by plaintiff in front of his house on Euphrosine Street, and also to remove the track of the defendant to a greater distance from the plaintiff's house—it being alleged that the track, as at present located, interferes with the use and enjoyment by plaintiff of his property. There was judgment for the defendant in the lower court and plaintiff appealed.

It is suggested on the part of the defence, that the Supreme Court, to which the case was returnable, was without jurisdiction by reason of the amount, and that as no bill of exceptions appeared in the record, this court cannot pass upon this case. La. Const., Art. 129.

The ruling in *State, ex rel D. Arcy, v. Parle*, 25 La. Ann. 64, appears to be in point, and sustains the jurisdiction.

The question of the right of the defendant, under its contract with, or license from, the city, to use Euphrosine and Magnolia Streets for its track, does not properly arise. Grant the right of the defendant to the use of those streets, and still the question remains of whether the defendant, as owner of the adjoining lot, has the right to use its property in such a way as to be a cause of injury and disturbance to its neighbor, and whether it is liable for the injury and damage thereby caused, and the injury and damage caused by the demolition of the awning. Whether the plaintiff had permission from the city of New Orleans to erect the awning, or whether it was erected in violation of a city ordinance, in no manner justified the act of the defendant in tearing it down; and, the countenance which it appears to have had from an employee of the city in so doing, cannot excuse the act or exonerate it from liability.

the right to annul municipal legislation which is in its nature unreasonable and oppressive. Same authorities.

The fact that defendant have long used this portion of the track curving further away from the property of plaintiff satisfies us that the injury and damage being now inflicted upon the plaintiff are in no manner a matter of necessity, and we believe that he has the right to insist that the track shall be moved further out, and as we have no data by which to determine how far the removal should be we are compelled either to non-suit plaintiff upon this point, or to remand. We believe the latter course is the better under all the circumstances, avoiding, as it does, expense and delay.

The damages awarded we do not consider excessive, and we know of no reason why we should not put this portion of the case at rest, while we remand as to the balance. Defendant, in its application for a rehearing, complains of this, but its counsel cites no authorities to support its position, and we see no reason for receding from what has been done. Rehearing is therefore refused.

Thos. Gilmore, Esq., attorney at law, acting as judge ad hoc, concurred in the foregoing opinion.

ELIAS SIMS ET AL.

v.

THE BROOKLYN STREET RAILROAD CO. ET AL.

(*Advance Case, Ohio. March 7, 1882.*)

By the Revised Statutes, Sec. 3248, the powers, business and property of the corporation having a capital stock must be exercised, conducted and controlled by its board of directors, who are duly elected and qualified; and a court of equity will not, on the application of a stockholder, interfere with its management and control of the corporate business, while acting within the scope of its authority, unless they are guilty of a breach of trust to the injury of such stockholder.

This principle is applicable to the action of the board of directors in receiving subscriptions for that portion of the authorized capital not taken before the corporation was organized, where it will promote the objects of the corporation. A subscription for such stock made by one member of the board, with the consent of the others, and payment of the par value thereof, when the transaction is free from fraud, and is beneficial to the corporation, will not be set aside, at the instance of a stockholder, when no action has been taken to withhold such stock from subscription or sale.

The exercise in good faith, by the council of a city or village, of the discretion vested in it by Section 2505 R. S., as corrected (77 O. L. 42), to grant permission to any corporation, company or individual, owning or having the right to construct a street railroad, to extend its track, where the council may deem such extension beneficial to the public, will not be interfered with by the court.

A street railroad corporation, which owns or has the right to construct a street railroad within a city or village, may, with the permission of the council of such city or village duly granted, extend its track beyond the termini named in the certificate of incorporation, subject to the provisions of Section 2505 of the Revised Statutes as corrected (77 O. L. 42).

The corporate power to make such an extension is conferred by statutes under which the company is incorporated and is acting. The ordinance granting permission to extend the track is not an act conferring corporate powers. It is merely a permit to the corporation to exercise the corporate powers conferred by general law, therefore such an ordinance is not an act conferring corporate powers, which is prohibited by Art. XIII, Sec. 1, of the Constitution of Ohio.

APPEAL—Reserved in the District Court of Cuyahoga County.

The Brooklyn Street R. R. Co. was incorporated August 25th, 1869, under the Act of April 10th, 1861 (58 O. L. 66), and the amendatory and supplementary acts. The authorized capital stock was \$30,000. It was organized October 5th, 1869, with a board of five directors. Its purpose was, as found by the court, to construct a street railroad from a point in the village of Brooklyn, a suburb of the city of Cleveland, through a portion of Brooklyn township, into said city along Pearl street to its intersection with Lorain street, where it would meet and connect with the West Side street railroad, for the carriage of passengers from points along its line to Superior street and the Public Square in said city, which was the ultimate destination of most of the passengers coming into the city. This was to be done by carrying them over its own line to its northern termination where it met the West Side road; "thence by way of this West Side Street Railroad or otherwise to Superior street and the Public Square, which are the ultimate destination of most of the passengers on said road."

The road was completed to its connection with the West Side road prior to December 1, 1870, and until November 1, 1880, it was operated under a lease, by the West Side Street R. R. Co., as a part of its continuous line to the village of Brooklyn. At the expiration of this lease, the Brooklyn Street R. R. Co. resumed possession and have since operated the same.

At the time the road was completed in 1870, about \$21,000 of the capital stock had been subscribed and paid in. Repeated efforts had from time to time been made by the directors to place the residue of this stock, prior to 1877, but without success, except in small amounts, so that in January, 1881, there remained \$8,250 of the stock untaken. At this time the matters in controversy arose. The Board of Directors, then, as theretofore, consisted of five stockholders, one of whom, Tom L. Johnson, was President. They decided that it was for the interest of the company to dispose of this residue of the capital stock, and to extend its line of road from its existing northern terminus along Pearl street over the viaduct to Superior street and the Public Square. They were proceeding

to take the necessary steps to that end, when the plaintiffs, as stockholders, commenced this action to enjoin them, and also to enjoin the city of Cleveland, also a defendant, from passing an ordinance granting permission for such an extension. The prayer of the petition is, to enjoin the Board from issuing certificates of stock for this \$8,250, to said Johnson, on the ground that the action of the Board in allowing him to subscribe and pay for this stock, was in fraud of the rights of the stockholders; also to enjoin the Board from taking steps, or instituting any proceedings to obtain the right to use the track of the West Side Street R. R. Co. from Pearl street to a connection with Superior street and the Public Square, and also to enjoin the city of Cleveland from passing an ordinance granting permission for such an extension. The grounds alleged for this relief are, that it would injuriously affect the interest of the stockholders, was a fraudulent plot or scheme to promote the interest of said Johnson, and was without authority of law and injurious to the stockholders.

Issue was joined upon these allegations, and upon appeal to the district court a special finding of fact was made, and the case was reserved for decision to this court.

From this finding and from the pleadings it appears that all efforts to place this unsubscribed stock had proved unsuccessful, that the company was largely in debt, and was by the action of the West Side street railroad cut off from a connection therewith at Lorain street over its track to the centre of the city, that at a board meeting held January 15, 1881, at which all the members, except one, was present, said Johnson proposed to take this \$8,250 of unsubscribed stock at par, to be paid for by him, partly in a debt owing to him by the company, partly in property and partly in his note. This offer was accepted by the other three directors present, he subscribed and paid for the same as proposed, and shortly thereafter paid his note in cash. The findings of the court negatives all allegations of fraud in this transaction, and finds that it was in good faith, that the consideration received was of the full value of the par amount of said stock, and that the property and money received was necessary for the uses of the company. It further finds, that the right of the company, if it can be lawfully acquired, to run its cars to Superior street and the Public Square, on the track of the West Side road from Lorain street to the viaduct and beyond, will be highly advantageous to the Brooklyn street company, and to the public, and that there is no practicable route for such an extension, except on and along said West Side track.

From the pleadings it appears that the company had taken steps to authorize such an extension, had acquired the necessary consent of property owners and had petitioned the council for permission to make the same, by using the track of the West Side company

for that purpose. It further appears that two ordinances were pending before the city council, in each of which it was proposed to grant such permission, on condition only, that the right to use the track of the West Side Street R. R. Co. should first be acquired by consent of said corporation or by lawful appropriation.

JOHNSON, J.

The plaintiffs as stockholders in the Brooklyn Street R. R. Co. seek equitable relief against the action of its board of directors.

They ask: 1st. To enjoin the board from issuing to defendant, Johnson, certificates of stock for \$8,250 subscribed and paid for, and to declare said contract of subscription void.

2d. To enjoin the city of Cleveland from passing an ordinance granting to said company permission to use the track of the West Side Street R. R. to extend its line to the business centre of the city.

3d. To enjoin the directors from taking any steps, or instituting any proceedings to obtain the right to such use, or to make such extension.

I. Are the plaintiffs entitled to an injunction against the issue of this stock, and to have the contract of subscription therefor declared void?

The authorized capital was \$30,000, of which all had been subscribed and paid for except \$8250. Repeated efforts had been made by the board to place all the stock, but with little success. The books for the subscription of stock had been formally opened by the incorporators, and most of the stock had been subscribed and paid for after the organization of the company and while these books were in the possession and under the control of the directors. They had never been closed by any action of the board, or of the stockholders.

The financial condition of the company was such that additional capital was necessary.

The directors allowed defendant, Johnson, to subscribe and pay for this untaken stock, at its par value. It is not claimed that it was worth more than par. Indeed from the allegations of the petition it was worth much less.

The consideration received was of the full value of said stock. The property and money received was necessary and proper for the use of the company. In short, the transaction was bona fide and beneficial to the company, and the contention is, that it was unauthorized, and therefore, that the contract was void. In this we do not concur.

This was not an increase of capital stock, beyond the amount authorized by the certificate of incorporation, hence the numerous authorities cited as to the power of the board to increase the capital stock, or to dispose of increased capital, do not apply. This stock was part of the authorized capital, which each subscriber for

stock, and each holder of stock had expressly agreed should be taken at par, at an open public subscription. Each stockholder took his stock, knowing that others, to the full amount of the authorized capital, could be associated with him in the business of the company.

Before the organization, the incorporators are authorized by statute to open books, receive subscriptions and the first payment thereon, and give notice for the election of directors. They are empowered to place all the authorized capital. After the directors are elected and qualified, "the corporate powers, business and property," of the corporation, "must be exercised, conducted and controlled by the board of directors (R. S. 3248). What power and control the stockholders in their capacity as such, in a stockholders' meeting duly held, may exercise over the business of the corporation, and over the board of directors, we need not determine, as in the case at bar, they have taken no action.

The books for the subscription of stock were opened by the incorporators. Neither stockholders or directors had ordered them closed. If the stockholders had the power to dispose of this unsubscribed stock they never sought to exercise it. In the absence of such action of the stockholders as would control the directors (if any such could be taken), the right to place the unsubscribed stock vested in the board of directors. They represented the corporation in all its business affairs, and were authorized to transact all the corporate business within the scope of its authority. In the exercise of these powers the directors are, at all times, subject to the equity jurisdiction of the courts, on the application of a stockholder or a minority of stockholders, to restrain all breaches of trust, or the exercise of powers not delegated to them, to the injury of stockholders.

If, however, the directors, who are presumed to represent the will of the majority, act within the scope of their powers, their will must govern in the absence of fraud or breach of trust.

Dodge v. Woolsey, 18 How. S. C. 342; *Ware v. Grand Junction Co.*, 2 Russ. & Mylne. 470; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Byron Stephens v. The Rutland & B. R. R. Co.*, 29 Vt. 545; *Russell v. The M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Kean v. Johnson et al.*, 1 Stock Ch. R. 401; *Field on Corporations*, secs. 141, 142.

Applying these principles to the case before us we hold: 1st. That the act of disposing of this stock at par, for a full and valuable consideration, was not in excess of the powers intrusted to the directors; and 2d. That the transaction being free from fraud and beneficial to the company, it was not such an abuse of the trust reposed in the board as warrants the interference of the chancellor.

The objection made, that Johnson was the President of the board, and that his associates could not dispose of this stock, is not

well taken. The majority of the board, excluding Johnson, agreed to this contract. At most it was voidable and not void. If in all respects fair and beneficial a court of equity will not avoid it. It being within the scope of the powers vested in the directors, in the absence of any controlling action by the stockholders, the contract to dispose of their stock to a director or stockholder, if made in good faith, and is beneficial to the company, will not be set aside at the instance of a minority of stockholders. In such a case there is not such an abuse of corporate power, nor is there an exercise of powers not granted as will authorize the intervention of the chancellor. *Smith v. Skeary*, 47 Conn. 47.

II. As to the prayer for an injunction against the city of Cleveland.

All the city is asked to do, or proposes to do, is, to grant permission to the Brooklyn Street R. R. Co. the privilege of occupying certain streets, and to use the track of another railroad company for its contemplated extension. The city does not propose, if it has the power, to invade or interfere with the private rights of the West Side Street R. R. Co. to the exclusive use of its track. The permission to occupy the street and to use this track, is upon the express condition, that the company acquire of the West Side Company by mutual consent or by appropriation, whatever property rights the West Side Company have therein. The statute vests in the city council the power to grant the use of the streets to any street railroad company, if beneficial to the public. A court of equity will not interfere with the exercise of this discretionary power in the absence of facts showing fraud or bad faith. *The State ex rel. v. Gas Company*, 37 O. S. 45.

III. Should the company be restrained from taking any steps, or instituting any proceedings to acquire the right to extend its lines and use the track of the West Side company for that purpose.

If it can be lawfully done the finding of the court is, that it will be highly beneficial to the company. The right to the relief prayed for, depends therefore on the underlying question, has the corporation the power to make the proposed extension. All questions of fraud or of injury to the stockholders are eliminated.

This corporation was incorporated and organized under the act of April 10th, 1861 (58 O. L. 66) and acts amendatory and supplementary thereto. The certificate was dated August 25, 1869, and the organization was perfected by the election of directors October 5th, 1869.

Section 1, of the act of 1861, prescribes the minimum number of natural persons required to form a corporation, and describes the manner of executing the certificate, and states what it shall contain. It must specify, (1) "The name assumed by such company. . . . (2) The name of the street, alley or avenue, with the description of the locality thereon of each terminus of said road, and the names

of the streets, alleys and avenues or other public grounds through which such road shall pass."

Sec. 2, among other things, provides "that when the foregoing provisions have been complied with, . . . such corporations shall be authorized to construct, operate and maintain a street railroad . . . on the streets, alleys or avenues . . . specified in the certificate . . . between the points of termini named in the certificate, and transport thereon passengers and their packages and baggage."

Section 5 required the consent of the city council to be first obtained before a street railroad could be commenced or constructed. This section was repealed by the act of May 27, 1866 (63 O. L. 55) (S. & S. 137-9), and sections 1 and 2 of the latter act were substituted. Section 1 of this act provided that no street railroad should be constructed or commenced until the consent of council be obtained, and authorized the council to agree upon the terms and conditions upon which the street should be occupied.

Section 2 requires the council to prescribe by ordinance the terms and conditions upon which the streets and avenues of the city may be occupied by street railroads.

Up to this time there was no authority vested in the city council to allow street railroad companies to extend their tracks beyond the limits named in this certificate of incorporation.

May 7, 1869, an act supplementary to the act of March 27, 1866, was passed, which in terms authorized such an extension (66 O. L. 140). It reads as follows: "It shall be lawful for the council of any city or incorporated village to grant permission by ordinance to any person or company, owning or having the right to construct, any street railroad, to extend their track on any street or streets where the said council shall deem such extension beneficial to the public. And when any such extension shall be made the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by such extension or consolidation." This power of extension under this act was in addition to the power to consolidate under sec. 4, of the act of 1861. The right of extension was, by the act of April 10, 1867 (64 O. L. 122) (S. & S. 138), so enlarged as to provide, that thereafter any road constructed in a city or village, may be extended without the limits thereof, along the public road, provided the proper authorities consent, etc.

The certificate of incorporation was taken out after the supplementary act of May 7, 1869, was in force. That act was as much the law governing the corporation as the act 1861. When this company became incorporated in August, 1869, it was empowered to exercise all the powers and enjoy the franchises granted by the act of 1861, and by the amending act of 1866, and also, by the act

supplementary thereto, of 1869. The franchises granted by this supplementary act are as much a part of its chartered powers and privileges as those embraced in the original act. Its language is unmistakable. It shall be lawful for the council to grant permission by ordinance, "to any person or company, owning or having the right to construct any street railroad, to extend their track," etc.

Section 5, of the act of 1861, and sections 1 and 2 of the act of 1866, did not authorize the council to permit an extension, but only to permit the use of its streets. As sections 1 and 2 of the act of 1861 limited the operations of the company to the termini named in the charter, so the permission granted to use the streets of the town or city, was by necessary implication limited to the same streets prior to the supplementary act of 1869. Sections 1 and 2 of the act of 1866 did not confer corporate power, but only authorized the council to grant permission to exercise the corporate powers conferred by sections 1 and 2, of the act of 1861, to wit: the right, with such permission, "to construct, operate and maintain a street railroad, . . . between the points named in the certificate."

The powers and franchises acquired by a certificate of incorporation in August, 1869, embrace not only those conferred by the acts of 1861 and 1866, but the additional franchise, if the corporation owned or acquired the right to construct a street railroad, of extending its track, subject to the provisions of sections 4 and 5 of the act of 1866.

It is contended that this supplementary act of 1869 is to be construed, as authorizing such permission within the termini named in the certificate and as limiting the corporation to the streets named in the certificate. This view is untenable. Sections 1 and 2 of the act of 1866, authorized permission in such cases. The supplementary act of 1869 was unnecessary for that purpose, and in that view a work of supererogation. To give it any force or effect, we must regard it as giving to such corporations, with the permission of the proper authorities, the right to extend "their track," beyond the termini named in the certificate of incorporation, if the company already owns a road or has acquired the right to construct one.

It follows, that such an extension is no violation of the contract with the stockholders, as among its powers and franchises to which they agreed is that of extending its track. *Sprague v. I. R. R. Co.*, 19 Ill. 174.

Again, it is said the act of 1869, so construed, is in violation of Art. XIII., Sec. 1, of the Constitution. "The General Assembly shall pass no special act conferring corporate power." It is said that, if the legislature cannot by special act confer corporate powers it cannot vest in city councils, the power by ordinance to do the same thing.

The vice of this argument is the assumption, that an ordinance granting permission for such an extension confers corporate powers. It only permits the exercise of such powers as are conferred by the statute. If such an ordinance confers corporate powers, then also does a like ordinance, under Sections 1 and 2 of the Act of 1866, which provide that no street railroad shall be constructed in any street without permission first being granted.

Neither statute authorizes the city council to confer corporate power. They vest in the city the right to grant or refuse to street railroad corporations permission to construct or extend their tracks under the corporate power acquired by their certificate of incorporation. For obvious reasons we have confined this discussion to the acts under which this company was incorporated. It is now governed by the provisions of the Revised Statutes (R. S. Sec. 3232). These will be found in sections 2501 to 2505 and sections 3437 to 3443.

So far as the questions involved in this case are concerned, they are in substance and legal effect the same as the original acts.

We conclude that the Brooklyn Street R. R. Co., being the owner of a street railroad, has the corporate power to extend its track, with the permission of the city council. As the exercise of this power, if it can be legally done as contemplated, will be highly beneficial to the corporation, there is no ground for the interference of a court of equity at the instance of stockholders.

It is said that one street railroad corporation cannot condemn a right to use in common the track of another like corporation. This question is not properly before us. It can only arise when the parties fail to agree, and where proceedings are instituted for that purpose. It will then be a question between the two corporations. If such right does exist, the plaintiffs cannot complain, as the court finds its exercise will be highly beneficial to them. If it does not exist, the West Side Street R. R. Co. can have ample protection without the aid of the plaintiffs.

Judgment accordingly.

FLAGG and others,

v.

MANHATTAN RAILWAY Co. and others.

(U. S. C. C., S. D., New York. December 21, 1881.)

An agreement between two corporations, whereby one guarantees the other a certain specified annual dividend on its capital stock, is not a guarantee to its stockholders severally, but to the corporation, and the power to modify the terms of such guarantee is in the directors of such corporations, not in the stockholders. Where such power is fairly exercised by the directors, in

view of all the circumstances, and in good faith, a court will not interfere, even though, on the same facts, it might have arrived at a different conclusion.

IN Equity.

S. P. Nash, for plaintiffs.

D. D. Field, for defendants.

BLATCHFORD, C. J.—This suit is brought by three persons as individuals and two persons as co-partners, who claim to be owners of shares of the capital stock of the Metropolitan Elevated Railway Co., 155, 10, 150, and 75 in number, of the par value of \$100 each, there being 65,000 shares in all. The three companies defendants are railroad corporations organized under the laws of the State of New York, and will be called the Manhattan, the Metropolitan, and the New York. The first company had no lines of railway. The second and third companies had elevated railways in the city of New York. On the twentieth of May, 1879, the three companies entered into a written agreement known as the "triparte" agreement. It recites that the agreement is made "for the purpose of avoiding the danger of crossing elevated railway tracks upon the same level, and otherwise securing to the people of New York the advantages of safer and more rapid transit through the action of one directing body." It provides for the execution of the leases hereinafter mentioned, and contains other provisions which it is not important at this point to notice. On the same day the Metropolitan and the Manhattan executed an agreement of lease in writing. It recites that the Metropolitan is authorized to construct and operate a line of elevated railway in the city of New York, a portion of which, specifying it, is completed and in operation by it, and is engaged in constructing other parts; that the New York is the owner of and engaged in operating certain lines of elevated railway in said city over routes heretofore established by law for it, "which railways and routes at various places unite with the railways and routes" of the Metropolitan, "and cross and connect and unite therewith at the same level;" that "the development of the business of passenger traffic on elevated railways in said city has made it necessary for each of said companies to run trains in such manner and with such speed and frequency that the crossing of the trains of one company over and upon the tracks of the other company, and the running of the trains of both companies upon the portions of the track and route jointly owned or used by them, is deemed impracticable except at the risk of inconvenience and delay to the public and danger to human life;" that, "after protracted efforts to devise plans for operating all said lines so as to afford to the public perfect fullness of accommodation and safety, it is the opinion of both companies that such management cannot be assured while the trains of the two companies are run under

the control of differing managing officers, or otherwise than by placing the lines of both companies under one sole control, with power to change from time to time the termini of routes, to regulate and limit the passage of trains from the tracks of one company upon the tracks of the other at the connecting and crossing points, and to do such other things and make such other changes, from time to time, in the entire management of traffic upon the lines of both railways, as experience may show to be necessary or desirable;" that the Manhattan "is by law authorized to construct and operate elevated railroads in the city of New York, whether owned or leased by it, and is willing and desirous to accept," and the Metropolitan and the New York "have agreed to execute and deliver to it leases of all their respective railways and properties as described in this instrument, and in a similar instrument of even date herewith to be executed by the New York," "as lessor to the Manhattan," "upon all and singular the terms, agreements and conditions herein and therein mentioned and set forth;" that the Metropolitan "has heretofore executed to the Central Trust Co. of New York its first mortgage, bearing date July 10th, 1878," "securing the bonds therein provided for, the total amount thereof now issued and agreed to be issued being \$8,500,000 of principal; that the Metropolitan "may be hereafter required" by the Manhattan "to issue further amounts of the said bonds secured by the said mortgage in excess of said \$8,500,000," for the purpose of constructing and equipping extensions of the line of the Metropolitan, "payment of all which bonds, principal and interest, is to be assumed by the Manhattan;" and that the Metropolitan "has issued and agreed to issue its capital stock to the amount, at its par value," of \$6,500,000, upon which stock the Manhattan "has agreed to guarantee the payment of a dividend of 10 per cent per annum as hereinafter provided."

Then, by the agreement, the Metropolitan, "in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part of the Manhattan," "to be paid, kept and performed," leases to the Manhattan "all and singular the railroad, or railway, now owned, operated or constructed by it in the city of New York, as above described, and all and singular the unfinished portions thereof now under construction, together with all its franchises, rights and privileges relating thereto, or to the construction and operation of its entire railway as authorized, subject to the said mortgage, and to the terms and conditions under which said franchises are held by the company, with all and singular the right, title, estate and interest which the Metropolitan company has in any real estate in the city of New York heretofore acquired by it, or which it may hereafter acquire under contracts already made therefor, being all and singular the entire property and estate of said Metropolitan company, except such of its fran-

chises, rights and privileges as are or may be necessary to preserve its corporate existence or organization, and its interest in the covenants and conditions of this indenture." The lease is for 999 years from November 1st, 1875, or so long as the Manhattan "shall continue to exist as a corporation, and be capable of exercising all the functions herein stipulated on its behalf;" the Manhattan paying to the Metropolitan the yearly rent of \$10,000, payable semi-annually on the first days of January and July, the first payment of \$5,000 to be made July 1st, 1879, "and keeping and performing all and singular the covenants and agreements hereinafter set forth to be by the Manhattan" "kept and performed." The Manhattan assumes and agrees to pay, as they respectively become due, the principal and interest of the said recited first mortgage bonds of the Metropolitan, and keep it harmless from all claims against it arising from all or any of said bonds. Then follows this article:

"Art. 2. The Manhattan company guarantees to the Metropolitan company an annual dividend of 10 per cent on the capital stock of the Metropolitan company, to the amount of \$6,500,000; that is to say, the Manhattan company will, each and every year during the term hereby granted, beginning with the first day of October, 1879, pay to the Metropolitan company \$650,000, free of all taxes, in equal quarterly payments of \$162,500 each, on the first days of January, April, July, and October, in each year, the first of such payments to be made on the first day of January, 1880, and the Manhattan company will, from time to time, execute in proper form a guarantee to the above effect, printed or engraved upon the certificates of stock of the Metropolitan company, and as such stock certificates are surrendered for cancellation and reissue, will, from time to time, at the request of the holder, renew such guarantee upon all reissued certificates."

It is then provided that the portions of the railway of the Metropolitan which were completed on the thirty-first of January, 1879, shall be deemed to have been operated from the close of business hours on that day by the Manhattan, and all such operation from and after that time shall be for the account of the Manhattan; that the Manhattan shall run the railways, and keep them in repair and working order, and supplied with rolling stock and equipment; that, "in addition to the rental hereinabove provided," it shall pay all taxes, assessments, duties, imposts, dues, and charges which shall become payable by the Metropolitan, or be imposed on the leased property, or its business, earnings, or income; that the Manhattan will save harmless the Metropolitan against all expenses of operating the railways, and all claims and suits for injuries to persons and property, or for causing the death of any person, or for any other thing in the operation or management of the leased property, or for any breach of contract by the Manhattan in carrying on the business, and will defend all suits and claims brought

against the Metropolitan in respect of any matter arising out of the management or operation of said railways since January 31st, 1879, and that, in case the Manhattan shall at any time fail to pay in full said cash rental, "or the guaranteed dividend aforesaid, as the same shall become payable, or fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and continue in default in respect to the performance of such covenant or agreement, or payments, for the period of ninety days," the Metropolitan may enter on the leased railways and premises, and thenceforth hold, possess and enjoy them as of its former estate, and, upon such entry, the interest of the Manhattan therein shall cease. The Manhattan then agrees with the Metropolitan that it will execute, acknowledge and deliver "any and all instruments for the more effectually assuring unto the Metropolitan" "the payment of the cash rental and dividends hereinbefore reserved or agreed to be paid." On the same twentieth of May, 1879, an agreement of lease, in writing, was executed by the Manhattan and the New York, in like terms, in all respects, mutatis mutandis, with the one between the Manhattan and the Metropolitan.

Under these agreements of lease the Manhattan proceeded to operate the railways of the other two companies. On the second of July, 1881, the people of the State of New York brought a suit in the supreme court of New York, against the Manhattan, the complaint in which sets forth the fact of said leases, and the operation of the roads under them by the Manhattan; that by their terms it agreed to pay outstanding obligations of the other two companies amounting to very large sums, and, under them, is now liable for the payment of bonds of said companies, amounting in the aggregate to about \$21,000,000, and the interest thereupon, and for the payment of all taxes on said roads, and to pay to said companies certain additional fixed charges created by said leases, and which aggregate more than \$1,300,000 per annum; that the Manhattan is, and for a long time has been, operating said railroads at a great loss, which loss for the year ending September 30, 1880, was, according to the estimates, about \$500,000; that the continued operation of said road by it will result in further loss to it; that it owes, and for a long time past has owed, a sum exceeding \$900,000 for taxes unpaid, a large part of which has been due for more than one year; that it has no assets with which to meet its existing indebtedness, and the requirements of said leases, except the receipts which accrue to it, from time to time, from said roads, which fall short of its annually-accruing obligations to the amount of at least \$1,000,000 per annum; and that, on or about April 25, 1881, it addressed a communication in writing to the mayor, comptroller, and corporation counsel of the city of New York, whereby it declared itself to be unable to defray its obligations, especially its indebtedness for taxes, and in substance declared itself insolvent

and showed it had been so for more than a year. The complaint prayed a dissolution of the incorporation of the Manhattan, and a forfeiture of its corporate rights, privileges and franchises, and the appointment of a receiver of its property, and of a temporary receiver. On the 12th of July, 1881, the Manhattan answered the complaint, denying its insolvency, admitting that during the year ending September 30, 1880, the said roads were operated by it at a loss, and that, on or about the twenty-fifth of April, 1881, it addressed a communication in writing to the mayor, comptroller, and corporation counsel of the city of New York, and denying the other material allegations of the complaint. On the thirteenth of July, 1881, the supreme court, by Mr. Justice Westbrook, after a hearing of both parties, appointed John F. Dillon and Amos L. Hopkins to be temporary receivers of the Manhattan. On the twenty-third of July, 1881, the New York presented to the supreme court a petition in said suit, praying that the Manhattan and the receivers be directed to deliver over to the New York its railways and other property. The petition alleges that the Manhattan owes the New York for gross rental, dividend rental, and interest on mortgage bonds \$465,000 and has not paid the taxes assessed on the New York for 1879 and 1880; that the New York owes no debts except its first-mortgage bonds to the amount of \$3,500,000, and claims for damages and taxes which the Manhattan is bound to pay, and has a considerable cash surplus on hand; that the Metropolitan owes first-mortgage bonds to the amount of \$10,818,000, and second-mortgage bonds to the amount of \$2,000,000; that the net earnings of the railways of the New York for the last two years have been more than enough to pay the interest on its bonds and dividends of at least 10 per cent to its shareholders, but the net earnings of the railways of the Metropolitan have been barely enough to pay the interest on its bonds; that the dividend rental paid to the Metropolitan for the six months prior to July, 1881, has been paid out of the earnings of the New York; that the indebtedness of the Manhattan to the New York is increasing every day, and the railways of the New York and the Metropolitan are now run at the expense and risk of the New York; that the structures and rolling stock of the New York and the Metropolitan have not been kept up to the standard required by the tripartite agreement and the leases, and the falling off in this respect has been greater on the New York railways than on the Metropolitan; that the Manhattan has kept up the structures and rolling stock of the Metropolitan better than it has kept up those of the New York; that a considerable number of the engines of the New York have been sold by the Manhattan, which has neither replaced the same nor paid the proceeds to the New York; and that the New York, if it got back its railways in their present condition, would have to pay a large sum to replace its rolling stock and structures in the state

in which the Manhattan took them. This petition was brought to a hearing before Mr. Justice Westbrook on the fourteenth of September. No decision on it being made, the New York, on the thirtieth of September, presented a supplemental petition, praying the same relief, and setting forth that since the default of the Manhattan in not paying to the New York the various sums of money which were due on July 22d, 90 days have elapsed, the last day of the 90 being September 29th; that none of said moneys have been paid, except \$50,000, paid before the former petition was brought; that on the 29th of September the New York demanded of the Manhattan and of its receivers payment of said sums, but they were not paid; that by reason thereof a forfeiture of said leasehold estate has accrued to the New York, and that it is entitled to the possession thereof. This supplemental petition was brought before the court on the third of October, and, after hearing the plaintiffs in the suit and the receivers, and the New York, the Metropolitan, and the Manhattan, an order was made giving leave to the Manhattan and the Metropolitan to answer on or before October 5th, and directing that the supplemental petition be considered as part of the original petition.

On the eighth of October, 1881, the receivers put in an answer to the petition of the New York, and the Manhattan put in an answer to it similar to the answer of the receivers. The answer sets up that on or about August 31st, 1881, one Watson brought a suit in this court, by leave of the said supreme court, in behalf of himself and all other stockholders of the Manhattan, against the New York and the Metropolitan and the receivers, by filing a bill of complaint and serving process on the defendants, the same being what is known as a stockholders' suit, and, in substance and effect, a suit by the Manhattan against the New York and the Metropolitan to have judicially determined whether the New York and also the Metropolitan are not indebted to the Manhattan each in the sum of \$6,500,000, the bill alleging an indebtedness of the New York to the Manhattan of \$6,500,000 and seeking to enforce such liability, and praying an accounting of the operations of the lease from the New York, and that the New York be decreed to pay to the Manhattan or to the receivers such sum as may be found due; that the legal rights and equities of the New York and the Manhattan are necessarily involved in said suit, and the supreme court ought to leave the rights of the parties to be determined therein on issues regularly made and tried on proof; that the supreme court should not, as a court of equity, enforce the forfeiture asked, but leave the New York, by ejectment or other remedy at law, to recover possession of the property; that there are \$13,000,000 of Manhattan stock outstanding in the hands of numerous and scattered holders; that the effect of granting an order of forfeiture will be to destroy the value of such stock beyond repair; that on the last day of Sep-

tember an injunction order was in force, granted by Mr. Justice Westbrook, in said suit, restraining the Manhattan and its officers from interfering in any way in the business of the Manhattan; that the three companies are, and were on the thirtieth of September, by an injunction issued in a suit in this court, each of them enjoined from paying any taxes imposed on the capital stock and personal property of any one of them by the city of New York for the year 1880; that the New York, in a suit brought by it in July, 1881, against the Manhattan and the Metropolitan, obtained an injunction order restraining the Manhattan from parting with any moneys then in the possession or under the control of the Manhattan, which had been or might be received by it from traffic on any of the railways of the New York, except as required strictly for the operation of the railways of the New York leased to the Manhattan, which injunction was in force on the last day of September; that the Manhattan is not in default for not paying taxes assessed on the New York for the years 1879 and 1880; that as to the remainder of the taxes assessed on the New York, the Manhattan, because the taxes were excessive, unequal and illegal, determined, with the concurrent consent of the New York and the Metropolitan, that payment of them should be refused and proceedings be taken to review such unlawful taxation, and such proceedings were taken and are pending in the name and at the request of the New York to contest the legality of said taxes and the obligation of the Manhattan to pay them; that the alleged default of the Manhattan in not paying the taxes assessed upon the New York in the years 1879 and 1880 was in accordance with the express instructions of the New York to that effect, and the action of the Manhattan in relation thereto was essential to the protection of the rights of the companies parties to the tripartite agreement, and of the stockholders of each of said companies; and that on or about the first of October, 1881, the New York and the Metropolitan demanded of the receivers the payment of rent alleged to be due to them respectively from the Manhattan under said leases.

Mr. Justice Westbrook rendered a decision on the petition of the New York, at a date stated in the bill in this suit to have been on or about the fourteenth of October, 1881. The decision refers to the fact that in the tripartite agreement the Manhattan agrees to issue and deliver to the New York and the Metropolitan its two bonds, each for \$6,500,000, payable on demand,—one to a trustee for the stockholders of the New York, and the other to a trustee for the stockholders of the Metropolitan, with authority to the trustees respectively to use the same, if they see fit, in payment for the stock of the Manhattan at par; and that the said bonds were executed and exchanged for stock in the Manhattan, so that the New York and the Metropolitan, or their stockholders, became the owners of the entire capital stock of the Manhattan, then amounting to

\$13,000,000. Mr. Justice Westbrook held that the mere appointment of the receivers did not terminate the lease, nor did the insolvency of the Manhattan, if it were insolvent; that the court had no power to settle the questions involved summarily, or otherwise than in an action regularly instituted by the New York to recover the property; that the failure to pay the taxes did not forfeit the lease, because the New York had approved the non-payment, and because there was a proper question as to the lawfulness of the taxes not paid; and that the testimony as to a breach of the lease by not keeping the road of the New York in repair was conflicting. As to the default for 90 days in paying the rent, the judge remarked that the New York had obtained the said injunction against the Manhattan, and could not enforce a forfeiture arising from the non-payment of money, when it had itself enjoined the Manhattan from using the principal part of its revenue for any such purpose. The judge then proceeds to say:

"Waiving, however, this point, there is another of great importance also made by said answers of the Manhattan Co. and the receivers, which will now be stated. It will be remembered that the capital stock of the Manhattan Co. is \$13,000,000. This entire stock was transferred and given to the New York Co. and the Metropolitan Co. in professed payment of the leases made to the Manhattan Co.—\$6,500,000 to each. It is true, this was not directly done, for the form was the execution of two bonds by the Manhattan Co. of \$6,500,000 each,—the one to a trustee for the benefit of the New York Co., and the other to a trustee for the benefit of the Metropolitan,—which bonds were exchangeable for the stock of the Manhattan Co. at par, and such exchange was immediately made. The directors of the Manhattan Co. were persons who were directors of the other two companies. By the terms of the lease the Manhattan Co. was to pay the bonded debt of the other companies, with the interest, and also an annual dividend of 10 per cent on the capital stock of the lessor companies, in quarter-yearly payments. The plain effect of this transaction is manifest. The lessor companies being the owners of the stock of the lessee company, and their directors being its directors, the individuals owning the stock of the former really agreed with themselves to pay themselves a large and liberal rental for the use by themselves of their own property. This was the real transaction, but, as individuals were concealed under the cloak of corporations, the apparent transaction, which alone the general public would be apt to see, was a leasing from two independent corporate bodies to a third equally independent. Such leasing, however, was at a rental which, if the estimates of the earning capacity of the leased roads, submitted upon this motion by the petitioner to prove the bankruptcy of the tenant company, are accurate, it was impossible for such company to pay. The individuals who had thus extracted the life from the

lessee company by the provision for the payment to themselves of liberal dividends and the absorption of its entire stock, proceeded to divide and did divide such stock among themselves, and then disposed of it to the general public, thus shifting the burden of paying rent from themselves to others, and actually receiving from such strangers to the original transaction large sums for the privilege of assuming burdens they could not discharge, and which could only result in the restoration to them of the property leased, and the absolute loss by the buyers of Manhattan stock of their whole purchase price. To recover payment for this stock from the two lessor companies an action is now pending in the United States circuit court for the southern district of New York, brought by John O. Watson, a stockholder of the Manhattan Co., to which suit, by permission of this court, the receivers appointed in this action are parties. The existence of this action, and the grave questions which it presents, are urged both by the Manhattan Co. and the receivers as reasons why, in advance of the determination thereof, this court should not surrender the property it holds by its receivers. It would, perhaps, be improper to express an opinion upon the merits of this action further than to say that it presents reasonable grounds for judicial inquiry. As a rule, stock purchased of a corporation must be paid for either in cash or its equivalent, and, if not so paid for, the money which it represents can be recovered. The answer of the petitioning company is, of course, that the stock was paid for by the lease which it gave. Whether, however, this was a bona fide exchange of a substantial thing which the law can treat and regard as a payment for the stock transferred, or the contrary, is the point which that suit presents. Leaving out of view the very grave questions of the power of the lessor companies to lease its roads, and of the lessor company to accept them,—which is not considered, because not presented nor argued, but which leases, if illegal, because ultra vires, would leave the stock of the Manhattan Co. entirely unpaid for,—is it not most apparent that the innocent holders and purchasers of the stock of the Manhattan Co. have grave questions to submit to the courts, both as against the lessor companies and also their stockholders, who placed the Manhattan stock upon the market to their great injury? It is enough for present purposes, without passing directly upon the merits of the Watson suit, to say that which is unjust is unlawful, and for every unlawful act done to another to his injury the law affords a remedy. Whether any of the apparently bald facts which have been mentioned can be explained so as to give them a different color, is a question for the trial. As they appear upon this motion to me, it is plain that they should not be ignored, and the property asked for surrendered upon the ground of the non-payment of obligations incurred by the lease, when, perhaps, a trial of the action pending may determine that the

Manhattan Co. is not a debtor to, but a creditor of, the petitioner."

After thus reaching a conclusion on the merits adverse to the relief sought, the judge held that, as the application was one addressed to the discretion of the court, and as it involved grave and difficult questions of law and fact, it ought to be disposed of by an action, and not by a motion. He added:

"To the general objection of deciding such grave questions as this application involves so summarily is added one growing out of the tripartite agreement hereinbefore detailed. A sort of quasi partnership was thereby formed between the three contracting parties. The Metropolitan Co. joins its objections to those of the Manhattan Co., and protests against the granting of the petition, and claims the right to be heard by a formal suit upon the issues which have been presented. Their request is reasonable, and the relief asked for must be denied upon the ground of discretion, also, without prejudice, however, to the right of petitioner to bring an action against the receivers, leave to do which will be granted."

The portions of the tripartite agreement thus referred to as forming a sort of quasi partnership are a provision providing for building certain parts of the railway structures at the joint expense of the New York and the Metropolitan, and a provision (article 14) that whenever, in any fiscal year, the Manhattan shall elect to declare a dividend of more than 10 per cent on its capital stock, the Manhattan shall pay to the New York and the Metropolitan a sum sufficient to enable them to pay as large a dividend in excess of 10 per cent on the stock of the New York and the Metropolitan as shall be declared on the stock of the Manhattan, in connection with the other provisions of that agreement.

Such was the condition of the litigation between or affecting the three companies, so far as it is material to refer to it, when, on the twenty-second of October, 1881, the agreement in writing was made between them, out of which the present suit arises. It sets forth, as part of it, copies of the tripartite agreement and of the two leases. It then recites that possession of the railways and property leased was delivered to the Manhattan, and it continued in the possession and operation thereof until July 14, 1881, when possession thereof was delivered to said receivers, who are still in possession thereof, operating them; that "it has been found impracticable to carry out the various terms and conditions imposed by said agreement and leases on the Manhattan;" that the interests of each of the parties, as well as the interest of the public, still require that the lines of railway shall continue to be operated under a single management, and that the parties, "for the purpose of settling all the matters and differences between them, and for continuing the operation of said properties and railways by a single management,"

have agreed to modify the said agreement and leases as hereinafter set forth. It then provides as follows:

First. The Manhattan shall continue to possess and operate the properties and railways for the period and on the terms agreed in the leases, except as "herein" modified or changed, such possession to commence as soon as the properties can be obtained from the receivers.

Second. The Manhattan, from moneys received by it on acquiring possession of the properties, and all moneys thereafter acquired by it from the operation of them, after the payment of operating expenses, and of all lawful taxes and assessments against either of the parties or its property, and before paying the sums mentioned in clause 3, shall pay: (1) To the New York all sums of money due and owing to it, under the terms of the lease from it, on the first of July, 1881. (2) To the Metropolitan in the same manner, and out of said moneys, the interest due on its bonds, as provided in the lease from it, from the first of January, 1881.

Third. After making the payments provided for by clause 2, all moneys received by the Manhattan from the operation of the properties shall be used by the Manhattan: (1) For the payment of operating expenses and maintenance of structures and equipment. (2) For the payment of all taxes and assessments lawfully imposed upon either of the parties, or its properties, or the income therefrom. (3) For the payment of the interest on the bonds of the New York and Metropolitan. (4) For the payment to each of them of the rental of \$10,000 per annum, as set forth in the leases. (5) The Manhattan shall pay to the New York annually, during the continuance of the leases, a sum of money equal to 6 per cent per annum on the amount of the present capital stock, to-wit, \$6,500,000 of the New York, in equal quarterly payments of \$97,500, on the first days of January, April, July, and October; the first to be made January 1, 1882. (6) The Manhattan shall pay to the Metropolitan annually, during the continuance of the leases, a sum of money equal to 6 per cent. per annum on the amount of the capital stock of the Metropolitan, in equal quarter-yearly payments, on the first days of January, April, July, and October; the first to be made January 1, 1882. (7) The several payments enumerated in the foregoing six subdivisions of clause 3 shall be made, and shall have preference over one another, in the order so enumerated, and all moneys received by the Manhattan from the operation of the properties, after making said payment, shall be the property of the Manhattan, and shall be retained by it for its own use and benefit, subject to the covenants "herein" contained, and to unmodified covenants of the leases. (8) The sums provided to be paid by subdivisions 5 and 6 of clause 3 shall only be payable out of the moneys received by the Manhattan from the operation of the properties prior to the

dates respectively at which said payments by the terms of the agreement become due.

Fourth. The provisions of the tripartite agreement and the leases are modified so as to conform to "the provisions of this agreement," and the New York and the Metropolitan release the Manhattan from all agreements to pay to the New York and the Metropolitan, or either of them, "the sum or sums of money as is particularly provided in" article 14 of the tripartite agreement and article 2 of the leases.

There is also a clause whereby each of the parties releases the others, and each of them, "of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims, and demands whatever, whether in law or in equity, against either of the other parties hereto, except such as are embraced in and created by the terms of said agreement and leases, as modified, and the terms and provisions of this agreement." By a supplemental agreement of the same date, executed by the three parties, it was further agreed that the Manhattan will pay to the New York all sums due and owing to it under its lease to the Manhattan, up to and including October 1, 1881, and that the Manhattan will pay the New York the sum of 6 per cent. on its present capital stock "in the manner and at the times stated in the foregoing agreement, and the payment thereof shall be cumulative, notwithstanding any provision in the eighth subdivision of the third clause thereof."

The bill in this suit is brought by the plaintiffs in their own behalf, and in behalf of all others, shareholders in the Metropolitan, similarly situated with the plaintiff, who may come in and contribute to the expenses of the action, and consent to be bound by the decree herein. It alleges that immediately after the execution of the tripartite agreement and the leases, and the delivery of its road to the Manhattan, the Metropolitan, in order to secure to its shareholders the benefit of article 2 of the lease, and in order to enhance the value of the shares of said stock, caused to be printed on the stock certificates of the Metropolitan the following memorandum: "The Manhattan Ry. Co., for value received, has agreed to pay to the Metropolitan Elevated Ry. Co. an amount equal to 10 per cent per annum on the capital stock of the latter company,—that is to say, on \$6,500,000, payable quarterly, commencing Jan. 1, 1880;" that the capital stock of the Metropolitan then was, and still is, \$6,500,000, divided into 65,000 shares of the par value of \$100 each; that all the certificates of said shares issued by the company after the execution and delivery of the tripartite agreement and leases were issued with said memorandum printed thereon; that the said shares were largely dealt in in the city of New York, and were bought and sold as stock, upon which an annual dividend of 10 per cent was guaranteed by the Manhattan, and as, upon the

sale and transfer, from time to time, of shares of said stock, certificates were surrendered for cancellation and reissue, the Metropolitan issued new certificates containing the same memorandum, and no shares were dealt in after January, 1880, which did not contain said memorandum; that during the year 1880 the Manhattan paid to the Metropolitan quarterly, and the holders of shares of the Metropolitan received, the said dividends so "guaranteed," and said dividends were also paid in January and April, 1881, but thereafter the Manhattan made default in the payment of the dividend due July 1, 1881, and has hitherto continued in default; and that each of the plaintiffs purchased his stock as stock upon which a dividend of 10 per cent was guaranteed by the Manhattan, and with knowledge of the general provisions of the tripartite agreement and the leases, and the certificates issued to the plaintiffs by the Metropolitan having each of them on it the said memorandum.

The bill recites the appointment of the receivers, and alleges that on or about the twenty-fifth of October, 1881, by order of the court, the property was surrendered by the receiver to the Manhattan, and the receivership was vacated. It sets forth the fact of the application of the New York for the restoration of its property and of its denial, and the making of the agreement of October 22d. It alleges that the suit brought on behalf of the people was not ended until about November 17th; that there has been no material change in the alleged insolvent condition of the Manhattan which made the receivership proper, other than such as may result from the execution of the agreement of October 22d; that, during the receivership, negotiations were entered upon between some of the officers of the three companies looking to a modification of the terms of the tripartite agreement and the leases; and that, during the pendency of said negotiations, it was given out, and the plaintiffs expected that the terms of any arrangement which should be concurred in by the officers negotiating on behalf of the several companies would be submitted to the shareholders for approval, but the plaintiffs have never been consulted in respect to said proposed agreement, and have never consented thereto, and have only been able to ascertain the terms of the same with considerable difficulty.

The bill further alleges that, by the agreement of October 22d, the officers of the Metropolitan have undertaken to subordinate the rights and the position of the Metropolitan to the New York, especially by releasing all claims to the dividends accruing July 1st and October 1st, amounting to \$325,000, whereas the same amount due to the New York is to be paid, and, in reference to future dividends, by waiving altogether the guarantee of the Manhattan, and making the dividends payable to the Metropolitan payable only after the dividends to the New York shall have been first paid, and out of any surplus earnings that may be left; that, in the supplemental agreement of the same date, the rights and position of the

Metropolitan were further subordinated to the New York, in that the dividends agreed to be paid to the New York were to be cumulative, while those due to the Metropolitan could never be paid out of any earnings, however large, received after the date of the accruing of the dividend; that the officers of the Metropolitan, who have actively labored to consummate said arrangement, have betrayed its true interests, and the rights and interests of its shareholders, influenced thereto by corrupt motives, and by personal interest hostile to their position and duties as its directors; that at an election of directors held in July, 1881, Russell Sage and Jay Gould became for the first time directors of the Metropolitan; that the Manhattan being shortly thereafter, and on or about July 13th, placed in the hands of receivers, its shares became very much depressed in value, and in August following sold as low as \$16 per share; that thereupon said Gould, being a director of the Metropolitan, began purchasing shares in the Manhattan, and on October 8th had standing in his own name, on the books of the Manhattan, 20,000 shares; that 1000 shares then stood in the name of the son, George J. Gould, 1100 shares in the name of W. E. Connor, and 12,400 shares in the name of W. E. Connor & Co., who have heretofore acted as the brokers of said Gould in the purchase and sale of stock, and in which firm said Gould is a partner; that said 14,500 shares belong to or are held in the interest of said Gould; that when said agreement was made he had invested in the stock of the Manhattan over \$500,000; that said Sage, a director and the president of the Metropolitan, is largely interested in the stock of the Manhattan, though his name appears on its stock register as the holder of only 100 shares; that said Gould is in his own name the largest holder of stock in the Manhattan, substantially all of which he has acquired since he became a director of the Metropolitan; that he, together with said Sage, took an active and the principal part in the negotiations which led to the agreement of October 22d; that the negotiations on the part of the New York were conducted by its president, Cyrus W. Field; that though he holds, as appears by the stock register of the Manhattan, only 100 shares of its stock, he has become largely interested in the Manhattan, and began to purchase shares of it as soon as it seemed probable said agreement would be executed and in view of its being carried into effect; that said Sage, who, as president of the Metropolitan, executed said agreements of October 22d, and said Gould, who actively influenced their execution, were, from their fiduciary position, disqualified from executing the same without the consent of the shareholders of the company they represented, and that the same were executed corruptly, for the personal ends of the signers of the same.

The bill further alleges that the Metropolitan, on or about November 1, 1879, executed a mortgage on their line and property, second and subordinate to the mortgage referred to in the tripartite agree-

ment, for the purpose of raising funds to complete and improve the unfinished lines, as provided in said agreement, such second mortgage being made to secure \$4,600,000 of bonds; that only \$2,000,000 thereof had been issued and negotiated at the time of said receivership; that now the Metropolitan has proposed to issue the residue of the bonds provided for in said second mortgage, and to deliver them for negotiation to the Manhattan, and allow it to receive and use the proceeds of the bonds. It also alleges that the Metropolitan, being now in the control of the directors who concurred in the execution of the modified agreement, is shaping its action so as to compel dissentient shareholders to acquiesce in the terms of said agreement, it having stamped as cancelled the guarantee printed on its stock certificates, and upon a transfer of any certificate containing the guarantee, refusing to issue to the transferee a similar certificate, or any other than a certificate with the guaranty cancelled; that in aid of this scheme, they, immediately after the execution of said agreement, closed the transfer books of the company; and that the acts and doings of the company, under the management of its present directors, are in hostility to the true interests of the shareholders, and planned in order, through the operation of the market and the customs of the stock exchange, to deprive dissentient shareholders of their just and equitable rights.

The prayer of the bill is:

(1) For a decree that the two agreements dated October 22d are null and void and inoperative as against the plaintiffs; (2) that the Manhattan be perpetually enjoined from performing the same, so far as they change or undertake to change the terms of the tripartite agreement and the leases; (3) that the Metropolitan be enjoined, until the further order of the court, from delivering any of its money or property to the Manhattan, or from issuing to it any of its mortgage bonds for negotiation, or from allowing it to receive the proceeds of any such bonds, or from changing the form of the stock certificates of the Metropolitan, in respect to the matters printed thereon, or doing any other acts which, in respect to the dealings in said shares, or the terms of said certificates, or their registration, shall modify, impair, or embarrass any holders of the certificates having the said memorandum printed thereon; (4) that the Manhattan be enjoined from paying or transferring to the New York any moneys or shares in action under the agreement of October 22d, and from performing any part of the agreement of that date, so far as they change, or undertake to change the terms of the tripartite agreement and the leases.

The bill is not signed or verified by any of the plaintiffs. It is signed by the plaintiffs' solicitors, and the affidavit of one of them is appended to it to the effect that he has read the bill; that the facts therein stated are true to the best of his knowledge and belief; that the ownership by the plaintiffs of the shares of stock, as al-

leged, has been stated by them in petitions signed for the purpose of being admitted to the benefit of the suit of Gillett against the same defendants; and that the reason why such verification is not made by the plaintiffs is their absence from the state. Those petitions are not brought before this court.

The two agreements of October 22d are signed by the New York, by said Field, as president; by the Metropolitan, by said Sage, as president; and by the Manhattan, by R. M. Gallaway, as president.

The plaintiffs now moved for a preliminary injunction to the purport prayed in the bill. The motion is supported and opposed by affidavits. The facts hereinbefore set forth are free from dispute. The bill is brought by the plaintiffs in their own behalf, and in behalf of all others, shareholders in the Metropolitan, similarly situated with the plaintiffs, who may come in and contribute to the expenses of this suit and consent to be bound by the decree herein. A holder of 50 shares of the stock, bought in February, 1881, makes oath that he bought them with the knowledge of, and in reliance on, the guaranty of the Manhattan, and knowing that he had an interest in the earnings of the Manhattan after the payment of the guaranty to the leased lines and dividends on the Manhattan stock. A holder of 148 shares of the stock, bought in 1880, makes oath that the inducement to him to purchase it was the said guaranty and the positions of equality of the New York and the Metropolitan, and that the action of the directors of the Metropolitan in reducing the dividend on said stock was without his consent, and is a great damage to him, and is illegal and void. These affidavits may be regarded, perhaps, as supplying the defect in the verification of the bill.

1. The principal ground urged in support of the motion is that the agreements of October 22d impair vested rights of the stockholders of the Metropolitan; that each stockholder has for himself such vested rights, and that these rights cannot be impaired as to him without his consent. It is urged that after the Metropolitan lease was executed there was no property left to it upon which anything in the nature of a dividend-paying stock could be based, except the revenue to be derived from the terms of the lease; that the value of the capital stock consisted wholly in such revenue; that the \$162,500 to be paid quarterly to the Metropolitan was the only profit which investors in the stock could hope to realize from their investment; that the stock is stock of a special character, entitled to an agreed portion of a rental to be paid by the Manhattan; that the agreement of the Manhattan is truly expressed in the memorandum on the certificates; that, by the whole transaction, the Metropolitan agrees to distribute such portion of the rental as a dividend among its stockholders; that the Metropolitan, therefore, cannot surrender the guaranty of the Manhattan; that such guaranty must

be regarded as a promise to the Metropolitan for the benefit of its stockholders; and that they are entitled to prevent the Metropolitan from diverting the fund or impairing the contract out of which the right to it comes.

It is undoubtedly true that the object of the provisions of the lease in regard to the 10 per cent. per annum on \$6,500,000, to be paid by the Manhattan to the Metropolitan, was to enable the stockholders of the Metropolitan to have, if possible, during the continuance of the lease, a quarterly dividend of $2\frac{1}{4}$ per cent. on their stock. But I fail to see any contract to that effect between the Manhattan and the individual stockholders of the Metropolitan, or between such stockholders and the Metropolitan. The language of article 2 of the lease is that the Manhattan guaranties to the Metropolitan an annual dividend of 10 per cent on the capital stock of the Metropolitan to the amount of \$6,500,000; "that is to say," the guaranty is to the Metropolitan, not to its stockholders severally. The article then goes on to interpret the guaranty, and to show what it is, and at what times payments under it are to be made. It says, "that is to say," the Manhattan will, each and every year during the term beginning with October 1, 1879, pay to the Metropolitan \$650,000, free of all taxes, in equal quarterly payments of \$162,500 each, on the 1st days of January, April, July, and October in each year, the first to be made January 1, 1880. There is no agreement, either by the Manhattan or the Metropolitan, that these sums shall be paid to the stockholders of the Metropolitan. Then there is the further provision that the Manhattan will, from time to time, execute in proper form a guaranty "to the above effect," printed or engraved on the certificates of stock of the Metropolitan, and, as such stock certificates are surrendered for cancellation and reissue, will, from time to time, at the request of the holder, "renew such guaranty" upon all reissued certificates. This was never done. The Manhattan never executed anything on the certificates. The Metropolitan issued the certificates with an unexecuted memorandum, which does not contain the word "guaranty," and contains no contract or agreement or guaranty of any kind, but only a statement that the Manhattan has agreed to pay to the Metropolitan an amount equal to 10 per cent. per annum on the capital stock of the Metropolitan; that is to say, on the \$6,500,000, payable quarterly, commencing January 1, 1880. This was the interpretation put at the time on the agreement of the Manhattan by the Metropolitan, and accepted by each stockholder of the Metropolitan when he took his certificate. If any stockholder was entitled, on request to the Manhattan, to a guaranty of any kind executed by it on his certificate of stock, he waived his right to it. But, if he had asked for and received it, it would have been "a guaranty to the above effect," being a repetition of the agreement to make the quarterly payments to the Metropolitan; that is, an agreement to do what

the memorandum states that the Manhattan had agreed to do. This would not have been any more of a contract between the Manhattan and the stockholder, or between the Metropolitan and the stockholder, than now exists.

2. The case, therefore, is not one of any vested right in the stockholders of the Metropolitan to the 10 per cent payments, but it depends on the general power of the directors of a corporation to make and modify its contracts. That power is well established in this state. *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207, 216. Nor can the stockholders control that power. *McCullough v. Moss*, 5 Denio, 566, 575. No statute or authority is referred to which makes it necessary to the validity of the agreements of October 22d that they should have been approved by any one or more stockholders.

3. The leases and the tripartite agreement and the agreements of October 22d were made under the authority of the act of April 23, 1839, (Laws of New York, 1839, c. 218, p. 195,) which provides that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." There is nothing to impeach the validity of that statute. The instruments referred to are contracts by the Manhattan and the other two companies for the use by the former of the roads of the latter, on terms satisfactory to each of the latter, as determined by the votes of their boards of directors.

4. It is urged that the question should be considered as if the Metropolitan, on the failure of the Manhattan to fulfil its covenants in the lease, had re-entered, and as if the question were as to a new lease, with terms such as now obtain in the lease as modified. In this view the new lease is objected to as ultra vires, because it appropriates the revenues of the Metropolitan, as a part of the general funds of the Manhattan, to pay preferred dividends to the New York. The contention is that the Manhattan is to receive all the earnings of the lines of the Metropolitan, and, after paying expenses, taxes, interest, etc., is to pay, first, a dividend of 6 per cent on the stock of the New York; and that, as the earnings of the Metropolitan are not to be kept separate, no such arrangement can be made without the consent of the stockholders of the Metropolitan. The question is not one of power, but of good faith. If, in good faith, the discretion and judgment of the directors of the Metropolitan were fairly exercised, under the circumstances in which the affairs of the corporation were at the time, in view of all its embarrassments, and of the condition of the Manhattan, and of the litigations existing and threatened, and of the claims made against the Metropolitan and its stockholders by the Manhattan and the stockholders of the Manhattan, and of the relative condi-

tions of the two properties, and of the past and the probable prospective earnings of the roads of the New York and the Metropolitan, no court will undertake to interfere with the exercise of such discretion and judgment, even though, on the same facts, it might have arrived or may arrive at a different conclusion, and even though the stockholders of the Metropolitan might have arrived at a different conclusion. In this view the remarks cited from the decision of Judge Westbrook become of great importance. His views in regard to the claim of the Manhattan for the \$13,000,000 were calculated to have great weight, and it is shown they did have great weight in regard to some of the terms of a new arrangement. The Manhattan had made two defaults in paying the dividend rentals, it had been put into the hands of receivers, it was alleged to be insolvent, and it was asserting the claims for \$13,000,000. It was perfectly clear that the interests of the public demanded that the two elevated roads should be under one management, and the interests of the public were the interests of the two lessor companies. The state of things was such that the common manager must be the Manhattan. Therefore, its obligations to the other two companies must be modified, because they were too onerous to be fulfilled. The only question was as to the new obligations. The evidence satisfactorily shows that the roads of the Metropolitan were not earning enough net money, over expenses, repairs, and taxes, to pay the interest on its mortgage bonds, and that the New York was earning at least 6 per cent. net, and enough more to make reasonable the preferences given to it over the Metropolitan in the new arrangement. By that agreement the claims of the Manhattan for the \$13,000,000 are released. But, whatever conclusion now a judicial tribunal would come to, on proofs, as to whether the new arrangement was a wise and proper one for the Metropolitan to make, it is sufficient to say that, on the evidence now presented as to what was before the directors of the Metropolitan, and as to their action, they had a right to think, in good faith, that they were doing what was most judicious for their stockholders, and they did what they did in good faith.

5. It is contended that a fictitious necessity was created, and that the stockholders of the Manhattan would have come forward to extricate it from its difficulties. I see no evidence of this. The directors of the Metropolitan had this question before them, necessarily, and passed upon it and acted in view of it.

6. It is alleged in the bill that Messrs. Sage and Gould, while acting as directors of the Metropolitan to make the new arrangement in its behalf, were large holders of the stock of the Manhattan Company, and that Mr. Field was at the time a large shareholder in the Manhattan. The directors of the Metropolitan who voted to approve the agreement of October 22d were Messrs. Sage, Gould, Connor, Sloan, Dillon, Navarro, Stout, Dodge, and Porter.

Mr. Garrison was absent. Mr. Kneeland voted in the negative. Leaving out Messrs. Sage, Gould, and Connor, six of the ten present voted in favor of the agreement. As to the supplemental agreement, there were ten directors present, Mr. Sloan being absent. Mr. Stout did not vote. Of the nine voting, Messrs. Sage, Gould, Dillon, Navarro, Connor, Dodge, Porter, and Garrison voted to approve the supplemental agreement, and Mr. Kneeland voted in the negative. Leaving out Messrs. Sage, Gould, and Connor, five of the nine voting voted to approve the supplemental agreement. There were eleven directors in all. Nothing is alleged in impeachment of the positions of Messrs. Sloan, Dillon, Navarro, Garrison, Stout, Dodge, or Porter. Therefore, whatever may be shown as to the positions of Messrs. Gould, Sage, and Connor, the legal aspect of the transaction is not affected.

Mr. Gould was elected a director of the Metropolitan on July 9, 1881. He states that at the time of making the settlement of October 22d he had an interest of 2,500 shares in the Metropolitan, and of 5,000 shares in the New York, his cash investment for the two being \$710,354.21, while his actual cash investment in the Manhattan was \$599,031.25.

Mr. Sage states that at the time of the agreement of October 22d he held about 1,200 shares of stock in the Metropolitan. He was appointed president of the Metropolitan in July, 1881. He says that at that time he had about 800 shares of the Manhattan stock, but within a few days thereafter "was short" of Manhattan stock, and from that time until after the agreement of October 22d bought no stock of the Manhattan, nor became interested in any, except for the purpose of fulfilling previous contracts; and that his pecuniary interest, if he "had any during the period, was to raise the price of Metropolitan stock and depress the price of Manhattan stock."

Mr. Field states that he sold out all his Manhattan stock, except 13 shares, in November, 1879, and sold those in March, 1880; and that he never bought or became interested again in Manhattan stock until October, 1881, after he "became convinced that a compromise would be made." But he sustained no fiduciary relation to the stockholders of the Metropolitan.

7. The concurrent testimony is that the Manhattan is now entirely solvent; made so, it is true, by the new arrangement, but still solvent. It is out of the hands of the receivers. The tripartite agreement and the leases, except as modified, are in force and are in force as modified. The mortgage bonds, the issuing of which is sought to be restrained, are to be issued, it appears, under the tripartite agreement and the leases, and pursuant to resolutions passed before the agreement of October 22d, and their proceeds are to be used in perfecting the structure and equipment of the Metropolitan, and in securing the safety of those who travel on the road.

The motion for an injunction is denied.

The bill in the Gillett suit is verified by the plaintiff therein. The motion for an injunction in that suit is denied, and the restraining order is vacated.

THE DISTRICT OF COLUMBIA

v.

THE WASHINGTON AND GEORGETOWN RAILROAD CO.

SAME

v.

THE METROPOLITAN RAILROAD CO.

(Advance Case, District of Columbia. January Term, 1882.)

Statutes of limitations are to be construed strictly and will not be extended by implication.

To arrive at the correct meaning of a statute the court will examine its language throughout and will import words from all portions of it to qualify the meaning of the whole.

As respects public rights municipal corporations are not within ordinary limitation statutes.

Under the second section of the Revised Statutes relating to the District of Columbia, the liability of the District to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it "a body corporate for municipal purposes," and, in the absence of any provision to the contrary, whatever liabilities may properly attach to municipalities in general, are equally devolved upon the District government. Hence, whenever the Maryland act of 1715, ch. 28, which is the statute of limitations in force in this District, may be interposed to a claim of an ordinary municipality, it may be availed of against the District of Columbia.

By the charter of certain street railway companies of Washington and Georgetown, the companies were required to keep their tracks and the adjacent part of the streets, at all times, well paved and in good order, without expense to the United States, and to the District, the District being also bound by statute to take all proper care of its streets and avenues. On the failure of the companies to perform this duty the work was done and paid for by the District, and to obtain reimbursement for the outlay, suit was afterwards brought by it against the companies. *Held*, 1. That after the acceptance of their charters, the companies could not be heard to object that the provision was illegal or incapable of enforcement against them. 2. That the right of action grew out of and was founded upon the obligation in the charters as well of the District as of the companies, and that the suit was an action founded upon those statutes. 3. That the statutory obligation of the companies had been broken if the paving had caused any expense to the District, and this fact would furnish the consideration and foundation of the claim for reimbursement. 4. That the action was not within any of the enumerated actions mentioned in the first section of the Maryland act of 1715, chap. 28, to which the plea of limitations would be available.

Charges or assessments made against property owners for street improve-

ments, by a municipality having power so to do, are in the nature of taxes and in the absence of some additional provision declaring limitation a bar, such a plea is no defence.

When the charter of the companies binds them to pave and keep in repair the streets upon which their tracks are laid and they neglect so to do, and the District thereupon does the work and brings suit against them for reimbursement, the fact that no assessment had been made against the companies by the District for such work is immaterial in its effect upon the right to set up limitations as a defence; the companies occupy the same position with respect to the statute of limitations that they would have held if the amount chargeable against them had been made the subject of a regular assessment which they had refused to pay and for which the action had been brought.

One section of the charters of the companies required them to keep their tracks, etc., at all times, well paved and in good order; and by another section it was provided, "that nothing in this act shall prevent the government, at any time, from altering the grades or otherwise improving all avenues or streets occupied by said roads, or the respective cities from so altering or improving such streets or avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of such company to change their said railroad so as to conform to such grade or pavement. The companies' charters also provided, "that the use and maintenance of said road shall be subject to the municipal regulations of the cities of Washington and Georgetown." *Held*, That the companies were bound by the charters not only to pave once the designated portions of the streets, but to repair the paving and to change the grade and lay new pavements within the prescribed limits whenever the municipality, in its discretion, should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies.

Where, on the failure of the companies to pave, etc., as required by their charters, the work is done by the District, assumpsit for the recovery of the sum expended is a more appropriate form of action than debt; and the declaration should charge that the sums paid were what the work was reasonably worth, the recovery being limited to such reasonable expenses incurred by the city as shall be ascertained by a jury. Extravagant amounts recklessly expended in the work without reference to its true value should not be allowed.

THE case is stated in the opinion.

Riddle and Miller for plaintiff.

Enoch Totten for defendant.

Mr. Justice Hagner delivered the opinion of the court.

These cases have been argued here in the first instance, and the interesting questions involved have been exhaustively discussed by counsel.

In the first case the District of Columbia claims from the Washington and Georgetown Co. \$20,049.66; and in the second, the sum of \$153,216.15 from the Metropolitan Co.

The pleadings are alike in essentials, and we shall consider those in the latter case, which we find printed in the record.

The declaration avers the incorporation of the plaintiff and defendant corporations; that the District Government is intrusted by law with ample powers to take charge of and improve all streets,

avenues, etc., of the consolidated municipality; that by the charter of the defendant, which it duly accepted, it was authorized to construct a street railroad between certain points therein named; that it entered upon, laid down and constructed its tracks along the streets and avenues designated, and still continues to retain and work its track along and over such streets and avenues. That by the fourth section of the charter it was provided: "That the said corporation hereby created shall be bound to keep said tracks, and for the space of two (2) feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order without expense to the United States or to the city of Washington." That afterwards, in the due exercise of the powers conferred upon the plaintiff and pursuant to law, it ordered and directed that said streets and avenues should be repaired and improved as follows, amending the grades and laying down new and greatly needed pavements, to wit: First street east, concrete pavement (with a similar statement as to a large number of other streets and avenues); of which the defendant had notice. That thereupon it became and was the duty of said defendant, pursuant to said fourth section of its charter, to conform its tracks to said grade, and pave the entire space between two lines running parallel with its tracks, two feet from and outside of its exterior rails, upon and along each and all of said streets and avenues so occupied by it, in conformity with the plan prescribed by the plaintiff; which said duty and obligation said railroad company neglected to do, and did not do; and thereupon the plaintiff, in execution of its orders and plans, and to complete the repairs and improvements of said streets and avenues, was obliged to and did grade and pave said portions of said streets and avenues which, as aforesaid, should have been graded and paved by said railroad company, to wit: On said First street east, one thousand four hundred and seventy-six and sixteen hundredths (1476.16) square yards of concrete pavement at three dollars (\$3) per square yard, amounting to the sum of four thousand four hundred and twenty-eight dollars and forty-eight cents, (\$4428.48,) said repair and improvement of said street being completed and finished by the plaintiff, to wit: November 24, 1873, (with similar statements with respect to the other streets and avenues so graded and paved).

And the declaration concluded:

"And the plaintiff claims as due it in all the sum of one hundred and fifty-three thousand two hundred and sixteen dollars and fifteen cents, (\$153,216.15,) which said account for work and material has been duly presented to the defendant, and payment thereof refused, whereby an action has accrued to the plaintiff to maintain its said action against the defendant, and recover said sum of one hundred and fifty-three thousand two hundred and sixteen

dollars and fifteen cents, (\$153,216.15,) for which it asks judgment.

The defendant appeared and pleaded—

1. That it is not indebted as alleged.
2. Non assumpsit *infra tres annos*.
3. *Actio non accrevit infra tres annos*.

The plaintiff joined issue upon the first plea, and demurred to the second and third, alleging as matter to be argued in support of the demurrer "that the nature of the case is such that the statute of limitations as pleaded does not apply.

First. It is insisted by the plaintiff that the statute of limitations of Maryland (1715, ch. 23,) which is in force here, cannot be pleaded to any action brought by the District of Columbia.

If the question were to be decided upon the construction of the statute alone, we should be very strongly inclined to sustain the plaintiff's position.

It is perfectly well settled that statutes of limitation which undertake to abridge or destroy the right of a suitor to bring his action at any time before payment, and are therefore in derogation of the common law maxim that "the right never dies," are to be construed strictly, and will not be extended by implication to cases not clearly designed to be included.

It is equally true that courts, to arrive at the correct meaning of a statute, will examine its language throughout, and will import words from all portions of it, to qualify the meaning of the whole. 7 Gill. 326, *Bode v. State*.

The courts of England applied these principles to the interpretation of the statute of limitations of 32 Henry 8, ch. 2, which limited the right of action in suits of right, or assize, etc., unless brought within sixty years from the accrual of the right. The language was most general, "no person or persons" shall maintain such actions; yet, as the statute, in some of the sections, speaks of the possession of the claimant "or his ancestor," Sir Robert Brooke, in his Reading on the Statute, says: "A mayor and commonalty, by their name of corporation, and not by their proper names, may make title, after the statute, by eighty years past, because that is of their own possession and not of the seizin of their ancestor or predecessor, and the same of dean and chapter," etc. Brooke Stat. of Lim. 33. And this ruling is recognized as correct by all the authorities. 6 Comyn's Dig. Temps (Geo. II.) p. 328.

Sir Robert Brooke died more than sixty years before the enactment of the 21 James I. ch. 16. It is impossible to doubt that the legislators who enacted that statute knew of this construction which many years before had been placed upon the statute of Henry VIII., and were therefore aware that the introduction of similar expressions into the law they were about to enact would be taken by the courts as indicating a purpose to confine its application to

individuals. And in this connection it is important to examine the phraseology of the 21 Jac. I., from which the Maryland statute was in great part taken.

In no part of it is there any reference in express terms or by allusion to actions by municipalities. The purpose of the act is declared to be the quieting of men's estates; the parties plaintiffs are spoken of throughout as "person or persons," and it is declared in the first section that "no person or persons or any of their heirs," shall have or maintain such actions after, etc.; and such actions "shall be sued . . . within twenty years next after title and cause of action first descended or fallen." By section 2, in case the person entitled shall be, at the time the right first descended, etc., within the age of twenty-one years, feme coverts, imprisoned, or beyond seas, then such person and persons, and their heir and heirs, shall have an action within the time limited after the removal of such impediment.

By section 4, in case judgment be given for the plaintiff in such action and be reversed for error, "the party plaintiff, his heirs, executors, or administrators, may commence a new action, etc." And by section 7 a saving is declared in favor of plaintiffs in the enumerated personal actions who may be under age, feme covert, etc., at the time such action accrued. None of the contingencies thus referred to could possibly apply to a municipality; and the personal actions enumerated, though properly such as would be brought by individuals, could not, for the greater part, be sustained by a city government.

It seems scarcely possible, with the rulings of the courts before them, that Parliament, in enacting this statute in such words as these, could have supposed it was using language which would comprehend the rights of the powerful municipalities of England, then almost at their greatest estate in the kingdom—far more wealthy and in some respects more powerful than the kings themselves—without adopting the precaution of adding words (and a few words would have sufficed) that would have placed the question beyond controversy. And it is a circumstance of the utmost significance that no case has been found, and we feel justified in saying, after examining every accessible authority, that none exists, in the English reports, where the statute of 21 Jac., ch. 16, has been held applicable to actions brought by a municipality.

When we examine the Maryland statute of 1715, ch. 23, its language appears to give still stronger indication that its framers never supposed they were passing a statute controlling the rights of municipalities. Annapolis was then the only city in the province, and its charter was but seven years old. The provincial lawyers were generally well read men, who had acquired their learning by study in the Inns of London, and their influence in shaping the legislation of the province was naturally very great. They must

have known that either express declaration or strong implication of intention was necessary to include a municipality in such a statute, and that if they used words which were properly applicable to individuals alone in describing the cases to be comprehended by the statute, the courts would limit its application accordingly.

They omitted from the law the prior sections of the 21 Jac. I. relating to suits respecting land, but added a section concerning bonds and other securities not found in the usual statutes of limitation in this country. It seems to us that almost every section of the act contains language of the character we have referred to, strongly evincing the intention of the provincial legislature to confine itself to what the preamble declares to be the purpose of the act, "the quieting of the estates of the inhabitants of the province." In the enumeration of actions in section 2 (almost all of which are such as a municipality would be most unlikely to bring), there is an exception of such as concern the trade or merchandise accounts between merchant and merchants, their factors and servants, which are not residents within this province." The act contains the saving clause as to persons under age, non compos mentis, etc., and a further provision as to actions on specialties "where the principal debtor and creditor have been both dead twelve years"—contingencies as impossible of application to a municipality as its ability to claim through an ancestor was held to be under the 32 Henry VIII.

And again, we are struck by the significant fact that, although the cases contained in the Maryland Reports, in which actions were brought by municipalities are numbered by the hundred, there can be found no reported case where it has been held that the statute applied to a suit brought by a municipality. In several of the cases, where the claims of a city government appear to have been contested by distinguished counsel with the utmost vigor, if we can only rely upon the dates stated by the reporter, the statute of limitations would have been a bar; but it never seems to have occurred to the counsel that it was available as a defence. Nor has such a decision been found in this jurisdiction, where for fifty years the courts have administered this statute; during which time a multitude of suits have been brought by the cities within the District, as to some of which it is but reasonable to suppose the plea of the statute would have applied.

There is a reason of special force in favor of maintaining this position with respect to municipalities which controlled the courts in England where suits were brought by ecclesiastical corporations to recover lands which had been the property of their predecessors. It was there held that as to actions to recover such properties as these corporations were inhibited by law from alienating, the statutes of limitations could not apply; since if it were otherwise, the laws against alienation could be practically repealed, as was

said, "by a side wind" by the corporations; who had only to allow themselves to be dispossessed and then neglect to bring suit for the recovery of such possessions within the time limited by the statutes. *Blanchard on Limitations*, 53.

By section 55 of Revised Statutes, District of Columbia, the District government is prohibited from releasing the indebtedness of any corporations or individual to the District.

Nothing would be simpler than for a District government wishing to evade this prohibition, to neglect to bring suit for three years against a favored debtor, which would operate as a bar against an action brought by their more conscientious successors to recover a claim justly due the municipality.

But we are aware that in some of the States of the Union it has been held that the statute of limitations is a bar to certain descriptions of suits brought by municipalities; and in others, that it has been held to apply to all actions corporations may bring.

The decisions upon the point are confined to this country. They are not numerous and the different rulings do not appear to be based upon consistent reasoning. The cases in 66 Pa. 223, *Evans v. Erie County*, and 4 Devereux, 568, *Armstrong v. Dalton*, were suits against counties, and there it was said that small divisions of the State, like counties, cannot be considered as sovereign, and are not, for that reason, entitled to avail themselves of the principle, *Nullum tempus occurrit regi*. In *Angell on Limitations*, 6th edition, section 38, the author, after citing the case in 4 Dev., disposes of the subject in this single sentence: "In Ohio, it was held that the statute runs against a town or city," citing the case of *Cincinnati v. First Presbyterian Church*, 5 Ohio, 298. The ruling in that case seems to be within the censure or disapproval of Judge Dillon, in the following resumé of the subject in 2 Dill. on *Municipal Corporations* (3d Ed.), Sec. 675. "Upon consideration it will perhaps appear that the following view is correct. Municipal corporations, as we have seen, have in some respects a double character—one public, the other (by way of distinction) private. As respects property not held for public use or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statutes of limitations."

But such a corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers, can defeat the right of the public thereto; yet there may grow up in consequence, private rights of more persuasive force in the particular case than those of the public. . . . The author cannot assent to the doctrine that as respects public rights municipal corporations are within ordinary limitation statutes."

This distinction is in consonance with the decision in 12 Ill. 59, *City of Alton v. Illinois Transportation Co.*, where the matter involved was the ownership of a lot of ground in the City of Alton. "We do not think," says the court, "the rights of the public are barred by our statute of limitations which prescribes that certain real actions shall be brought within seven years after possession taken by defendants. Without stopping to inquire whether statutes of limitations apply to municipalities, we entertain no doubt that this statute has no application to the case before us. Whatever title in these grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes and only for such. She may make rules and control them but cannot alien them, and holds them in trust for the people of the State and not of Alton alone."

For the purposes of the present decision, it will be sufficient, without discussing the applicability of the first part of Judge Dillon's language to cases arising under the Maryland statute, that we adopt the concluding words of the learned judge, in which the author withholds his assent to the doctrine, "that, as respects public rights, municipal corporations are within ordinary limitation statutes."

Second. It is contended by the plaintiff that however the law may be with respect to municipal corporations in general, a different rule should be held to apply to suits brought by the District of Columbia, because the money claimed in such cases is really due and payable to the United States. In support of this contention, it is insisted that the District as now constituted is but a department of the general government; its chief officers appointed by the president; its sole legislature the Congress of the United States, which appropriates immediately half of its expenses, directs the collections of its taxes, and supervises the disbursement of the municipal revenues; and that while one-half the amount of whatever might be recovered in this suit would be paid directly into the national treasury, the other half would substantially enure to its benefit.

Certainly these circumstances place the District of Columbia with respect to the United States in a position strangely anomalous. They undoubtedly operate to reduce its powers of administration much below the usual level of municipal dependence, unless they do as claimed, have the effect of communicating to it some portion of the dignity and immunities of the sovereign that has so seriously impaired its autonomy.

If the legislation of Congress had the extreme effect ascribed it by the plaintiff, the statute of limitations could no more apply to any action brought by the District of Columbia, than it could to one brought in the name of the United States itself. The courts

would certainly be controlled by the status of the real party in interest, rather than by that of the nominal plaintiff.

Thus in *1st Scammon, 106, State Bank of Illinois v. Brown*, it was held that the statute of limitations could not be successfully pleaded in a suit brought by the bank, in its own name, against one of its debtors, because the charter declared that the bank should belong to the State; and hence it was considered that a debt due to the bank was really one due to the State.

But this principle cannot properly be held to embrace all suits brought by the District of Columbia, in view of the comprehensive language of the statutes establishing the form of government in force here.

The second section of the Revised Statutes relating to the District of Columbia, provides:

"The District is created a government by the name of the District of Columbia, by which name it is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States."

And the act of July 11th, 1878, (20 Stats., p. 102,) declares that the District of Columbia shall remain and continue a municipal corporation as provided in this section.

Its liability to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it "a body corporate for municipal purposes;" and we are of the opinion, in the absence of any provision to the contrary, that whatever liabilities may properly attach to municipalities in general are equally devolved upon the District government; and hence, that wherever the statutes of limitations of Maryland may be interposed to a claim of an ordinary municipality, it may be availed of against the District of Columbia.

Third. The question next arises whether there is anything in the character of the claim involved in this suit which renders the plea of the statute of limitations inapplicable as a bar to the action.

The claim grows out of an obligation imposed upon the companies by the United States, and assumed by them when they accepted the charters, under the authority of which alone they can claim any right to occupy the streets of the city and operate their roads.

By this requirement, contained in the fourth section of each charter already quoted, the companies are bound to keep their track and the adjacent part of the street described, at all times well paved and in good order, without expense to the United States and to the cities named.

It was one of the few conditions imposed upon them when they

received their valuable franchises. It did not, as of course, result from the grant; for Congress might have agreed to dispense with it. Nor was it necessarily incident to the business of carrying passengers; since a large omnibus company might possibly make more extensive use of the streets in general, without incurring any liability to pay for paving any part of them. But it is wholly a statutory provision, and the liability imposed, therefore, is wholly statutory.

After the acceptance of their charters they could not be heard to object that the provision was illegal, or incapable of enforcement against them. 17 Hun., (N. Y.) 242; *New York City v. Steel Railway Companies*.

This duty, it is alleged, they refused to perform, and the work was done and paid for by the District, which now seeks reimbursement in this action. Upon the plain words of the statute it seems clear to us it is not within the enumeration in the first section of the act of limitations of 1715, ch. 23. It is not "an action of account," or "upon the case, upon simple contract, book debt, or account," or "of debt for lending," or of "contract without specialty," or "of debt for arrearages of rent;" nor is it one of the other enumerated actions, as "assault," etc.

If it be either of the enumerated actions it could only be an action upon one of the classes of contract referred to. But the suit is not brought upon a "simple contract," or "contract without specialty," upon the part of the companies to reimburse the District for the expenditure. It is based upon the obligation on their part, implied by construction of law, to repay to the District what it has expended for work they were bound by statute to perform without expense to the city. If this paving has caused any expense to the District their statutory obligation has been broken, and this fact furnishes the consideration and foundation of the claim for reimbursement. Apart from the obligation upon the District to take all proper care of the streets, imposed by statute, and the duty of the companies arising under their charters to see that this work is done without expense to the municipality, the action could not be maintained, for the unauthorized payment of money by one party for another, creates no legal liability upon the latter to repay. But the right of action here grows out of and is founded upon the obligation in the charters of both the city and the companies, and the suit is an action founded upon these statutes, within the meaning of that term.

It has been held uniformly, from a period within a few years after the passage of the 21 James I., that an action upon a statute was not within the limitations of that act.

This was decided in the familiar case of *Talory v. Jackson, Croke Charles*, 513, where it was held that the statute was no bar to an action of debt brought to recover a penalty imposed by 2

Edw. VI, for removing corn before setting apart the tithes. So in 1 Saund., 55, *Jones v. Pope*, where the action was against a sheriff for an escape under the statute 1 Rd. 2, ch. 12.

And this doctrine has been repeatedly applied by the courts in Maryland, in cases arising under the act of 1715, ch. 23.

Such was the ruling in 2 H. & McH., 145, *French v. O'Healey*, that an action founded on a statute cannot be barred by limitations, as debt for an escape.

So in 1 Gill, *Longwell v. Riginder*, 57, it was held that a distress for rent in arrear based upon statute is not within the statute of limitations.

And in 2d Maryland, 19, *Newcomer v. Keedy*, it was held in 1852, on the same ground, that limitations is no defense to an action on the case against a sheriff for a false return to a fi. fa., because the officer is made answerable for such misconduct by force of an ancient statute.

So it was held in 2 Md. Ch. Dec., 213, *Bond v. Harris*, that bonds given by an heir, electing to take part of the ancestors' land and pay their shares to the other heirs, in conformity with the statute for partition of lands, are not within the Maryland statute of limitations.

So in 14 Johns., *Pease v. Howard*, 479, which was an action on a judgment rendered by a justice of the peace, the court say: "The statute (of New York) is not a bar to every action of debt, but only to those brought for arrearages of rent or founded on any contract without specialty. Debt on indenture, reserving rent is not within the statute. The settled construction of the statute is that it applies solely to actions of debt founded upon contracts in fact, as contradistinguished from those arising by construction of law." In the present case the action is not founded upon a contract in fact, within the meaning of the statute.

But there is a further and conclusive reason why this action should not be held to be within the statute of limitations.

The municipality is charged with the entire custody of the streets and avenues of the city, and endowed with the amplest powers to pave and repair them, to change the grades, or otherwise improve them, and make all necessary regulations to this end. And it is perfectly settled that this is a continuing power, to be executed whenever it shall see fit to do so in its discretion. 6 Wheat., 597, *Gozler v. Georgetown*; 2 Dill., §§ 685-6, 780, 989, 990.

It has also full power to exact from property owners adjacent to the improvement a contribution in reimbursement of the cost, in proportion to their respective properties. Before collecting these contributions the municipality usually ascertains the aliquot part to be paid by the individuals, by an assessment. Such charges or assessments are in the nature of taxes or public dues, respecting streets and avenues, which are the common property held for pub-

lic use in trust for the body of the people, and are not owned by the municipality nor alienable by it, as a city may under certain circumstance sell the public property, and place the proceeds in the public treasury.

The imposition of such assessments is in fact the levy of a tax, and is made in the exercise of the taxing power. 7 Md., 535, *Mayor, etc., v. Greenmount Cemetery*.

Such assessments constitute liens upon the property of individuals subject to the charge, and are entitled to priority of payment out of the proceeds in advance of all other claims. 7 Md., 107, *Fulton v. Nicholson*.

And such paving assessment liens have been expressly held to be unaffected by the Maryland statute of limitations. 6 Md., 75, *Ea-back v. Pitts*.

In 2 Cranch, C. C. Reports, 355, *Hogan v. Ingle*, it was decided in this District that the statute of limitations of 1715, ch. 23, is not a bar to a distress for taxes due to the corporation of Washington. And no case has been found where the plea of the statute of limitations has been held to be a bar to an action to collect public taxes, except where some additional statutory provision, unknown in this jurisdiction, has been enacted to that effect.

We were referred to the cases in 41 Iowa, 184, *City of Burlington*; and *State v. Yellow Jacket Mining Co.*, 14 Nevada, 229, as holding a contrary doctrine; but an examination of the first case discloses that the Iowa statute in words provides that the provisions of the statute of limitations shall apply to all actions brought by or against all bodies corporate or politic, except where otherwise expressly declared, and the court held the municipality was within this express provision.

In Nevada, the statute of limitations in terms is declared to apply to all actions, whether brought by the State or individuals, and the court says the maxim *nullum tempus occurrit regi* has not been in force within that State since the adoption of the statute in question.

In some of the other States similar provisions are in force, and decisions based upon them have been carelessly considered as affecting the law elsewhere. Of course they can have no effect here, except as an evidence that in the absence of such a provision the statute of limitations would not have extended to the cases included within the special enactment.

This court, by its decision in 3d MacArthur, 122, *Baltimore and Ohio R. R. Co. v. District of Columbia*, has recognized the binding character of claims for taxes, notwithstanding the lapse of time. In that case the railroad company sought to enjoin the District from the sale of its property for twenty years arrearages of taxes. The company had refused to pay since 1858 (twenty-two years back), when an injunction had issued restraining a sale by a col-

lector for taxes then claimed to be due, and the subsequent acquiescence upon the part of the city was relied upon as a forfeiture "by waiver, laches, or lapse of time." This court overruled the other grounds of exemption presented by the company, and say, "in regard to the length of time for which the company should be held liable, we are of opinion that such liability reaches back for a period of twenty years from the institution of the present suit. It is a liability created by statute, and nothing short of a lapse of time sufficient to raise the presumption of payment will exonerate the property from its liability, and that period is twenty years."

It cannot be doubted that the statute, as pleaded in this case, would be no reply to an action brought by the District on such a claim for taxes asserted against the property of a land owner, in the absence of a statute declaring that limitations should be a bar.

Nor can it be doubted that the law would be the same if the claim sought to be enforced, instead of being an ordinary tax, were an assessment for paving against the property of a citizen.

In 46 Penn., 358, *Magee v. Com.*, use City of Pittsburg, which was an action by the city to recover the amount of an assessment against the defendant for his share of the cost of certain paving paid by the city, the defendant prayed an instruction that if the paving for which the claim was filed was paid by the city more than six years before the assessment was made, the claim of the city was barred by the statute of limitations. The court refused the prayer, and this ruling was sustained by the appellate court, which says: "the statute of limitations has no application to assessments under the acts, and the objection is grounded upon a misapprehension of the powers of the legislature."

In the present case there has been no regular assessment against these companies. But the obligation imposed upon them by law, and which they have assumed by their acceptance of the charters, is to perform their contract duty with respect to the public streets without any such assessment or levy as might be required in the case of holders of property abutting on the streets improved by the District. They have bound themselves, as part of the consideration for their franchise, to pave the designated parts of the streets for themselves, and any previous assessment by the District would be an idle and senseless ceremony. They knew exactly how much they were required to pave, and that they were to pay for it; and they had nothing to do except to perform the work "without expense to the United States or the District of Columbia." The assessment could have told them nothing not already known to them; and the District of Columbia could not have made the assessment, if required to do so, without obtaining the information from the company.

These companies, therefore, occupy, as to this statutory duty, the same position with respect to the statute of limitations that

they would hold if the amount chargeable against them for paving had been made the subject of a regular assessment, which they refused to pay, and for the recovery of which this action was brought. For those reasons, we are of the opinion that the claim as presented is not obnoxious to the plea of the statute of limitations, and we decide the demurrer is well taken to the second and third pleas of the defendant.

Fourth. Under the demurrer, we are forced to examine the entire case; and a large part of the argument has been addressed to the question whether under the charters and other statutes there exists in favor of the plaintiffs a liability on the part of the defendant to perform the work described in the declaration.

1. It is contended on behalf of the defendants that the companies are not liable for entirely new pavements and changes in the grades; and we are referred to the case of *Chicago v. Sheldon*, 9 Wall., 50, in support of this position. The decision there was based upon the special circumstances of the case. The city ordinance expressly limited the liability of the railroad company in undoubted terms to keeping the track, etc., "in good repair and condition," and the court reasonably decided that the company could not be held liable for curbing, grading and paving the streets, with an entirely new pavement in the face of a contrary stipulation.

But the language is widely different here. The companies, by the 4th section, are bound to keep the tracks, etc., at all times, "well paved and in good order." By section 5, of the charter of 17th May, 1862, the Washington and Georgetown Railway, and section 5 of the charter of the Metropolitan Road, July 1, 1864, it is enacted, "That nothing in this act shall prevent the Government, at any time, from altering the grades or otherwise improving all avenues or streets occupied by said roads; or the respective cities from so altering or improving such streets or avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of such company to change their said railroad so as to conform to such grade or pavement."

By section 20, of the charter of the Metropolitan Road, it is further enacted that the said railroad company shall keep in good repair, etc., the flagstones or cross-walks leading to, upon or over, their tracks at the crossings of the streets, "and shall further, whenever necessary to render such crossings dry and convenient, raise or elevate the same sufficiently for that purpose, and shall adjust the adjoining pavement so as to make it convenient for carriages to pass said crossings."

And in both charters it was provided "that the use and maintenance of the said roads shall be subject to the municipal regulations of the cities of Washington and Georgetown, within their several corporate limits."

Without pausing to examine the effect of the act of June 20, 1874, and other statutes on the subject, we entertain no doubt that these companies were bound by their charters not only to pave once the designated portions of the streets, but to repair the paving and to change the grade and lay new pavements within the prescribed limits whenever the municipality, in its discretion, should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies.

The reported cases fully sustain such a construction. In 51 Penn., 41, Pittsburgh and Birmingham R. R. Co. v. Borough of Birmingham, the charter required the previous assent of the borough by ordinance before the railroad could occupy its streets, and declared that the company "shall keep so much of the streets of the city and borough as may be used and occupied by them in perpetual good repair, at the proper expense and charge of the said company."

The ordinance of the borough agreeing that the company should occupy the streets, declared that "said R. R. Co., in addition to other requirements of their charter, shall keep Carson street in perpetual good order and repair, from curb to curb its whole length, from the time of accepting this ordinance."

These additional requirements were held by the court of appeals of Pennsylvania to be binding upon the company, although onerous and inconsistent with those prescribed by the charter, which gave no authority to the borough to add any further conditions, but merely requires its previous assent before the railroad could occupy the streets.

But in the present case Congress distinctly required, and the companies as distinctly agreed, that the use and maintenance of the road should be subject to the municipal regulations, which required the renewal of the pavement and change of the grades to conform to the changes in the other part of the street.

2d. Can an action be maintained at law to recover back what the district has been compelled to pay on the default of the companies to perform the work described in the declaration?

Assuming the obligation to be in force, it would seem too plain for argument that a right of action in some form must exist. For we can scarcely regard as serious the contention of counsel for the roads that the only available remedy in the case of default would be an application for a mandamus to compel the company to do the work; or the suing out of a scire facias to deprive them of their charters for neglect of their charter obligations.

A municipality that would leave the track of a railroad company refusing to comply with a required change of grade at a dangerous elevation or depression, while it was following an action of mandamus through the different courts on appeal, instead of at once performing its plain duty of making the requisite changes to insure

the public safety, would deserve a punishment more severe than the inevitable public censure. It would have no option in such a case but would be forced to perform the omitted work. That the negligent party should be made to repay the expense would be only a scant measure of justice.

We will refer to a few cases in support of the right of action under such circumstances.

In 45 Penna., 137, *Town of Phoenixville v. Phoenixville Iron Co.*, an action was brought by the town to recover from the company the amount it had expended for the repair of a bridge crossed by the defendant's railroad and also by foot passengers, which had been built at joint expense, but which the defendant refused to repair. Judge Strong, speaking for the court which sustained the town's right to recover, notices that the defendant's charter authorized them to construct the bridge and cross it with their railroad, but says nothing of repairs; but he adds: "It is a fair presumption the legislature never intended to give away public rights or to impose burdens upon any local community without compensation. This is a continuing obligation upon the company to keep up the bridge."

In 46 Pa., 224, *Penn. R. R. Co. v. Duquesne Borough*, the town brought an action to recover back the sum it had expended in rebuilding a bridge across a canal which had been taken by the railroad company under authority of a law of the State, which declares the company should receive this and the other public works, subject to existing contracts respecting them. The canal had erected the bridge originally, and it was insisted that the railroad, as its successor, was bound to repair and rebuild it.

The court held the action could be maintained, and in their opinion used this language: "Whenever any person or corporation is bound to repair a public highway and refuses to do so, when necessary, on notice by the proper officers, having the general oversight thereof, those officers may repair it and recover the proper expense thereof in an action of assumpsit founded on the duty."

A case very much like the one before us is reported in 44 Wisconsin Reports, 238, *City of Ocato v. Chicago and N. Western R. R. Co.* By the general statutes a corporation making a railroad is required to restore any street it may pass through, to its former condition and thereafter maintain the same in such condition against any effects thereafter produced by the railroad. Nothing is said in the law as to who should defray the cost of the repairs, nor of any action to recover their cost. The defendant after constructing its road through the city, though requested by the authorities, neglected to restore the streets and sidewalks to their former condition. The common council, which under the charter had full authority over the streets, procured the necessary repairs to be made and the city paid for them, and it was held it could re-

cover from the railroad company all reasonable expenses so incurred.

3d. The remaining question relates to the form of the declaration, which we must examine under the demurrer to the plea.

There seemed to exist some uncertainty in the minds of the counsel as to the precise nature of the declaration. The first plea of the defendant, which is *nil debet*, seems to have assumed the action to be debt, to which that plea is the general issue, while it is not applicable to an action of *assumpsit* or on the case. It is also laid down that *nil debet* is almost the only plea used in debt on statutes, whether *qui tam* or otherwise. 2 Evans' Harris, 94.

We think a recovery in the present case should be sought in an action of *assumpsit* founded upon the statutory obligations of the charter.

This form of action seems more appropriate than debt, because the latter lies for a sum certain, whereas the recovery here should be for such reasonable sum, to be ascertained by a jury, as the work done was really worth. Although the companies are alleged to have neglected to perform their duty in the premises, this would not authorize a recovery against them for the actual sum paid by the district, if the jury should think this was an extravagant amount, which the officers recklessly expended in the work, without reference to its true value. As in the case cited from 44 Wisconsin, the recovery should be limited to reasonable expenses incurred by the city. The jury in that case rejected one of the items of the account claimed by the city as not a proper charge against the said railroad company under the circumstances.

The case in 46 Penna., was in *assumpsit* founded on the duty arising out of the statutory obligation of the railroad company to keep up the canal bridge.

In 3 H. and McH., 323, *Ott v. Chapline*, an action of *assumpsit* was sustained, brought by a collector, who having taxes to collect from the defendant omitted to levy them, and having paid the amount over to the public brought his action for money paid at the defendant's request.

In the same volume, at page 4, is to be found the very instructive case of *Gash v. Taylor*. The plaintiff, the sheriff of Harford county, had paid into the State treasury, in settling his accounts, the amount of the treble tax required to be paid by the defendant as a non-juror for the years 1777-78-79; and in 1790 he brought an action of *assumpsit* in the general court to recover back the amount thus paid. The defendant asked an instruction that there could be no recovery, notwithstanding the payment, unless it was shown that the payment was at the instance and request of the defendant. This prayer was refused by the court, and the plaintiff recovered.

It is worthy of remark here, that although the claim in that case

was long out of date and based upon a claim of treble taxes created by a law made only for the exigency of the war, long since closed, the plea of the statute of limitations was not interposed.

In 6 H. and J., 383, *Mayor, etc., of Balto., v. Howard*, the city brought assumpsit to recover a sum of money due for paying taxes imposed by the city on the defendant. It was held, the action would lie, whether the act authorizing the tax gave a particular remedy or none, upon the principle that where a law gives a claim to one against another, it raises an implied assumpsit or legal obligation to pay; and that where a remedy by distress or action of debt is plainly given, it is only cumulative, and does not take away the action arising by implication, on the legal obligation to pay a claim created by law.

So in 1 Gill and Johnson, 499, *Dugan v. Margave*, the court sustained the right to recover in assumpsit for taxes levied under the city charter, and which the collector had lost the right to collect by distress, by his neglect in giving the notice required by law. "The imposition and assessment of a tax by the mayor, etc., in pursuance of the charter, creates a legal obligation to pay such tax, on which the law raises an implied assumpsit by the person taxed."

The tax in this case was levied in 1817, and the case was tried in the appellate court. It was argued by able counsel for the defendant, but the statute was not pleaded.

And in 16 Md., 259, *Clemens v. Mayor, etc., of Baltimore*, it was held that a claim for paying taxes assessed under a statute, might be recovered in an action of assumpsit.

The declaration in its present form, must be held to be in debt, and should be changed to assumpsit. It should also charge that the sums paid and now sought to be recovered back were what the work was reasonably worth; and it should set forth the other sections of the charter which require the companies to conform their track to the grade of the street, and should refer to the provision that the road shall be subject to the municipal regulations.

Demurrers of plaintiff to defendants' second and third pleas sustained, with leave to the plaintiff to amend its declaration.

The Chief Justice and Associate Justices Hagner and James sat in this case.

THE DISTRICT OF COLUMBIA

v.

THE BALTIMORE & POTOMAC R. R. Co.

(Advance Case, Supreme Court, District of Columbia. September Term, 1881.)

Where a municipality is mulcted in damages for injuries received by a party in falling into an excavation made by a railroad company in one of its streets, the latter is liable over for the amount paid; and it seems that this would be so even if the railroad company had been employed by the municipality to excavate the work, or even if the contractor for the work had agreed with the railroad company, either by stipulation or effect of law, to become answerable if an accident occurred.

Where a party liable over has been duly vouched to appear and defend the suit, but fails to do so, he is bound by the facts which must have been found by the jury to justify their verdict, and he will not be permitted to show the contrary is an action over against him.

A municipality charged with the duty and power to grade and alter the streets of its city is not answerable, in the performance of such work, for injury resulting to a citizen, unless negligence be shown.

But it is otherwise with a private corporation, who is liable like any other private person making a specially authorized but extraordinary use of a public street.

Such uses of public streets by private persons are lawful only because specially authorized, and while so conducted as to be harmless to others, but they become trespasses whenever injury occurs, whether resulting from negligence or not.

Evidence, therefore, by such a defendant to show all possible care and diligence if unaccompanied by any assertion of responsibility on the part of another, or of want of care on the part of the person injured, should be excluded as immaterial to the issue.

The fact that a municipality grants to a private person the right to engage in extraordinary work upon its streets does not deprive the municipality of the right to recover over against such person the amount which it (the municipality) has been compelled to pay to a citizen injured by reason of such work.

Nor will the fact that the action was brought by the injured party against the municipality instead of directly against the person engaged in such work enable the latter, in an action over against it, to set up absence of negligence as a defence on the ground that the municipality granted permission to do the work. The effect of such a grant being only to prevent the grantee from being a trespasser in the bare act of breaking up the street; but it gives no exemption from liability for injury resulting to others in the execution of the work.

As stated in the exception, the defendant's offer was "to prove that the defendant company was under no obligation to erect barricades. *Held*, that, as so stated, this was simply an offer to establish by evidence before the jury a proposition of law as to the defendant's liability and was properly rejected.

It seems that when a party has been compelled by the default of another (who is primarily liable) to pay damages for injuries received, he may recover in an action over the entire amount paid, with interest and costs of both suits.

THE case is stated in the opinion.
 Riddle and Miller for plaintiff.
 Enoch Totten for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

In 1873, William Barnes recovered a judgment against the District of Columbia for \$3500 and costs, for injuries sustained by him in falling into an unguarded excavation in K street, in the city of Washington. This judgment was affirmed by the Supreme Court of the United States, and in April, 1876, the District authorities paid to Barnes the amount of the judgment, with \$652.26 for interest, and \$173.09 costs of suit.

In November, 1876, the District of Columbia brought the present suit to recover from the railroad company the sum thus paid to Barnes.

The declaration recites the former recovery against the District, and charges in substance that the excavation into which Barnes fell was made by the railroad company in constructing a tunnel for their railroad along K street; that it was the duty of the company to guard the work so as to secure persons passing from accident by reason of the excavation, and that Barnes fell into it and was injured because the railroad company had left it open and unprotected. It avers a promise and undertaking on the part of the company to repay the money which the District had been compelled to pay in discharge of the judgment, and contains the common counts for money paid, etc.

The verdict was for the District, and the railroad company brings the case here on an exception which presents for examination several rulings of the judge below.

First. At the trial of the present case the District offered in evidence the pleadings and judgment in the Barnes case, and proceeded to show the payment of the judgment by the District, that Barnes received the injury by falling into the excavation made for the tunnel; and that before the trial of the Barnes case notice was served upon the proper officers of the railroad company, requiring and requesting the company to appear and defend the suit. And the District of Columbia there rested.

The railroad company thereupon, says the exception, asked the court to "decide that neither privity nor the relation of superior and inferior existed between the B. & P. R. R. Co. and the District of Columbia as to the matters and things involved in this action, and that this action could not be maintained against the said company upon the pleadings and facts in the case. But the court refused to declare the law as requested and held and decided that the railroad company was liable in this suit upon the state of facts. To which ruling an exception was noted at the time."

Assuming that this ruling is properly before us, we see no reason

to doubt that the court was right in refusing "to decide," as requested by the railroad company. The question of "superior and inferior" is in no degree involved in the present inquiry. There was no pretence that the railroad company had been employed by the municipality to execute the work, and was thus only the servant of the District in its performance. Nor, on the other hand, was it contended that the railroad company, by any form of agreement, had shifted its liability in the premises upon any contractor who had by stipulation or effect of law become answerable in its stead. And even if the latter position had been assumed, it would have been untenable.

In the cases of *Chicago v. Robbins*, 2 Black, and *Robbins v. Chicago*, 4 Wall. 670, it appeared that a lot owner had employed a contractor to erect a large building; that in the course of its erection an area was excavated in the sidewalk into which there fell a foot passenger who recovered damages against the city, which in turn sought to recover from the lot owner, Robbins, the amount of the judgment. Robbins distinctly relied upon the nature of the contract as exonerating him and fixing the liability upon his contractor. But the Supreme Court in the case in 2 Black, 427, say that, without disputing the doctrine of respondeat superior as an abstract proposition, they "cannot see that it is applicable to this case." "This area when it was begun was a lawful work, and, if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting out work like this to a contractor and shift responsibility on to him, if an accident occurs."

What was "held and decided" by the court below, after refusing the defendant's request, appears to be within the terms in which the liability of a municipality in a case like the present, has been correctly stated.

In 4 Wall. 672, Mr. Justice Clifford uses this language: "Preliminary to that part of the charge which is the subject of complaint, the court remarked that although municipal corporations were primarily liable for injuries occasioned by obstructions or defects in their streets or sidewalks, they yet might have a remedy over against the party who was in fault and who had so used the street or sidewalk as to produce the injury. Instruction was then given to the effect that if the defendant knew that the suit was pending and could have defended it, and it was through his fault that the party was injured, he was concluded by the judgment recovered against the corporation. Express notice, said the presiding justice, was not required, nor was it necessary that the officers of the corporation should have notified him that they would look to him for indemnity. Just exception certainly cannot be taken to those instructions, as they are in precise accordance with what

this court decided in this case when it was before the court on the former occasion.

Second. The defendant then made several offers of evidence, all of which was excluded, and we are asked to decide upon the propriety of its exclusion.

1st. The railroad company offered evidence "tending to show that the work of the construction of the tunnel had been done in a skilful manner, and that every reasonable precaution had been used, and every care taken by the said railroad company and its officers and agents to prevent accidents to persons and property;" "that the excavation was kept well barricaded and protected;" and "that, in fact, the defendant corporation and its agents, servants and workmen exercised all the care, skill and prudence possible under the circumstances to prevent accidents during the progress of the work."

In our opinion this testimony was properly rejected. Its purpose was to show to the jury an absence of negligence on the part of the railroad company, as evinced by the exercise of all possible care on the part of its servants in the construction of the tunnel.

But this very point had already been conclusively settled against the company in the previous suit which the railroad company had been duly vouched to appear to and defend.

There could have been no recovery against the District in the Barnes suit, except upon the distinct proof of negligence, since a municipality charged with the duty and power to grade and alter the streets of a city is not answerable for injury resulting to a citizen in the performance of such work, unless it be shown that its agents were guilty of negligence in the discharge of this public duty. Barnes accordingly charged expressly in his declaration that the District authorities permitted and allowed K street, between 6th and 7th streets s. e., to remain in a dangerous and unsafe condition, not barricaded, and without light or other signal to give warning to the wayfarer of the deep and dangerous excavation in the street, and that in consequence of such their gross negligence, the plaintiff fell into the opening and sustained the injuries complained of.

The excavation described was that made by the railroad company in the construction of their tunnel. With this work the city government had nothing whatever to do. The company alone were constructing it, and it was incumbent upon them to guard it and prevent its becoming a nuisance by being unprotected, at their peril. If the company had properly barricaded it, or warned persons off by proper lights, no accident could have happened, no negligence could have been established against the city, and there could have been no recovery against it.

The question of negligence was the cardinal all-important point

for the determination of that jury, and the railroad company was solicited to appear at that trial and show, if it could, that it had placed proper guards or barricades at the spot, or proper signal lights to give warning of the danger. After full notice "it kept silent when it should have spoken, and it cannot now be allowed to speak when it should keep silent." The verdict of the jury was a distinct finding of negligence on the part of the railroad company, the author of the nuisance, and was therefore a formal determination that the company did not exercise proper care in conducting and guarding the work, and that the injury resulted from their fault; "and if it was through his (its) fault that the party was injured he (the company) was concluded by the judgment recovered against the corporation." 4 Wall. 672.

If the company had been a formal co-defendant to the Barnes case, it could not be contended that the verdict would not have been conclusive against it on this point, and such was effectively its position after notice to appear and defend the suit.

"Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn round and evade the consequences which their own conduct and negligence have superinduced." 4 Wall. 674.

Without going further in the expression of an opinion as to the extent to which the judgment of Barnes v. The District is conclusive against the defendant, than is now required, we do not doubt that it must be held to have such effect at least to the extent spoken of in 10 Gray, 496, *City of Boston v. Worthington*: "The judgment recovered by Southwick against these defendants is therefore conclusive against them on three points—that the highway in Congress square was defective; that Southwick was injured there while using due care, and that he suffered to the extent of \$10,000." This was a case where the party sued over by the city defended upon the ground that he was only the lessee of the premises, and as such was not bound to keep up a railing about the cellar door.

The offer we are examining in the case at bar was unembarrassed by any such considerations, since it was not suggested therein that Barnes was not exercising proper caution—that the company did not, alone, make the excavation, or that, if any negligence existed, it was not solely the negligence of the company.

2d. But we are further of the opinion, since the sole purpose of the offer was to show that the defendant company was not guilty of negligence (unaccompanied by any claim of responsibility on the part of others for that negligence, if any existed, or of want of

due care on the part of the person injured), the evidence might well have been excluded upon the further ground of its immateriality to the issue.

The defendant is not a municipality, a department of the governing power, but it simply occupies the position of any private person making an extraordinary use of a public street, engaged in a work which is lawful only because specially authorized and while so conducted as to be harmless to others, but which becomes a trespass whenever injury occurs, whether it results from negligence or not. The rule is otherwise, as we have seen, with respect to a municipality; but in a trial by the injured party against this private corporation, the question of its negligence is not involved; and it would not be excused from responsibility merely by showing an absence of negligence. The law governing this question is well expounded in *Baltimore and Potomac R. R. Co. v. Reaney*, 42 Md. 131. In that case the present defendant, under the authority of its charter and of an ordinance of the city government, constructed a tunnel under the bed of Wilson street, in Baltimore city. The plaintiff sued to recover damages to his house caused by the excavation of the street, which, as he alleged, weakened the foundation of an adjoining house, near the tunnel, connected with the wall of the plaintiff's house by iron girders, and caused a settling, which cracked the walls and otherwise injured the house.

As the Maryland charter then invoked by the company is identical with that now relied on, and the ordinance of the city of Baltimore closely resembles that passed by the authorities of the District of Columbia, the decision of the court of last resort in Maryland upon the defenses then urged by the company is entitled to especial weight, apart from the learning of the court and the evilent good sense of the reasoning.

The court says: "The appellants having authority to construct the tunnel, they contend that any damage the appellee may have suffered to his house by reason of the excavation of the street, is *damnum absque injuria*, and that no right of recovery exists, unless it be shown that the power delegated to the appellants has been illegally or negligently exercised. To this, however, we do not assent.

"In this case the jury have found that the property of the appellee has been injured to the extent of \$3,000, and it would be a reproach to the law if the courts were required to determine that it was a case of *damnum absque injuria*, that there was no redress for such a wrong.

"As against a municipal government, in the careful exercise of its right and power to grade, change and improve the street, there could be no cause of action for any unavoidable injury done; but as against the appellants, a private corporation in no wise connected with the municipal government, obtaining authority to use the

streets in an extraordinary manner for its own private purposes and profit, the case is quite different. As against such party, the owner of a plot of ground, with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and State Legislature to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power the party producing it must be held liable. If, as we have seen, the injury be produced by the careless or negligent exercise of the authority, then there can be no question of the liability; but if due care be exercised, and the injury is the natural and inevitable result or consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury must indemnify the sufferer. That there was no negligence or want of care in doing the work, is no answer in a case like this.

"That the excavation of the street for the tunnel was lawful and done in a lawful manner at the time, can constitute no defense to this action, if damages actually resulted from the work. There are many cases in which an act may be perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but 'from the moment such damage arises, the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, doing no damage in the first instance to his neighbor, but subsequently causing his neighbor's land or his house to slide down into the excavation.'" And the court proceeds at length to justify its position by reference to adjudged English cases of authority, fully sustaining the opinion.

The rights of private individuals are not to be sacrificed needlessly to an act of incorporation. To the sufferer it is unimportant whether his property or his person has been injured by one or more persons acting in their individual capacity, or by the same persons carrying on a similar business under a corporate name, which the legislature, at their own solicitation, has allowed them to adopt solely for their private advantage. A railroad may perfectly well be built and used by a single individual, as was the case with the earliest railroads in England, and probably is the case in some instances there and in this country at the present time. It was competent for Congress to empower a single individual to excavate K street for the construction of a tunnel for a railroad. That permission would give the individual authority to make the requisite excavations, so that he could not be considered a trespasser so long as no injury resulted to others; but every step in his work would be taken at his peril, and he would be answerable for whatever in-

jury any one else might sustain from the exercise of his privilege, whether he used care and caution or not. Such franchises must be exercised in subordination to the prior existing rights of the citizen. For it cannot be imagined that any legislative body would attempt the enormity of granting such a privilege to one citizen, in utter contempt of the existing personal rights of others, equally deserving of protection, even if it possessed the power to do so. And what Congress would be incompetent to grant to a single individual or to several unincorporated, it would be equally powerless to commit to the same or other individuals trading under a corporate title.

In 2 Dillon on Municipal Corporations, (3d Ed.) §1032, the position is thus stated: "No person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous, or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made on the sidewalk by the abutter, or by unsafe hatchways left therein, or by opening or leaving open an area way in the pavement, or by undermining the street or sidewalk, or by placing unauthorized obstructions thereon, which makes the use of the street unsafe or less secure, is guilty of a nuisance and is liable to any person, who, using due care, sustains any special injury therefrom; and in such cases the person who created or continues the nuisance is thus liable, irrespective of the question of negligence on his part."

The principle finds its support in the maxim "*sic utere tuo ut non alienum lædas*:" One may have a clear right to the enjoyment of his property, and yet may be responsible to those injured by its use, notwithstanding he may have exercised all care to prevent injury. If injury results, why should an innocent third party bear it? In the case of *Scott v. Bay*, 3 Md., 445, an action was brought to recover damages resulting to neighboring property from the working of a stone quarry. The court below was asked to instruct the jury "that the defendant had the right to quarry stone from his quarries, and that the plaintiff cannot recover for any injury he may have sustained in consequence of such quarrying, if the jury believe the proper precautions were used in working the quarries, and that the injury was sustained without default of the defendant." The appellate court says: "If proper precautions had been taken they would still constitute no vindication of the defendant for the injuries resulting to the plaintiff." "It is a rule of the common law that a man should so use his own property as not to hurt or injure another, and, therefore, if he carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages. There are many cases in the books where this doctrine is applied, and among the number are those where a man erects a smith's forge, swine-sty, lime-kiln, tallow-fur-

nace, machine shop, quarry or privy so near the dwelling of another as to render it unfit for occupation."

In *Rylands v. Fletcher*, 3 L. R., Ho. of Lords, 330, the court say: "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." He is bound *sic uti suo ut non lædat alienum*.

It would have been scant comfort to the sufferer in the Barnes' case to be assured that the excavation into which he fell, and by reason of which he may have been rendered a cripple for life, was made with due care. The danger arose from the very nature of the improvement, which necessarily rendered the street unfit for night travel; yet the defendant assumed the risks of its construction.

In 45 Md., 135, *Lawson v. Price*, the action was for obstructing plaintiff's mill-race. The defendant's first prayer asserted his lawful right to clear his own land, and asked an instruction to the jury that if, in exercising this lawful right, the defendant was not guilty of negligence in cutting timber and clearing the land, the plaintiff was not entitled to recover, although by reason of such cutting and clearing, timber or brush fell into the mill-race, to the damage of the plaintiff. The appellate court says: "The first prayer was properly refused. It sought to make the appellee's right to recover depend upon the existence of negligence on the part of the appellant. The action was for obstructing the appellee's mill-race by throwing or placing therein or by cutting and allowing to fall therein, trees, logs, chips, branches, &c., whereby damage accrued to the appellee. The question in such case is not whether the appellant has acted with due care, but whether his acts have occasioned the damage complained of. If the acts complained of were done by the appellant, or by his agent or servant in the course of their employment, they were unlawful invasions of the appellee's right of property, and it matters not that they were done without negligence. Negligence is not the gravamen of the action."

So in the present case. The infliction of the injury shows that the excavation was left in a dangerous condition. The party making it, therefore, was a trespasser, and he should no more be allowed to defend himself by leading off the plaintiff into an examination of his want of negligence in committing the trespass, than to insist, if sued for a trespass upon another's close, that he ploughed his neighbor's land or cut down his shade trees with due circumspection and care. By the direct consequences of his act he inflicted injury upon another, and the law cannot be so unjust as to exonerate him upon the plea that when he destroyed another's rights he did so without negligence.

3. Does the fact that the company was authorized by law to construct the tunnel render this principle inapplicable?

In our opinion that circumstance can have do such effect.

The legislative permission authorized the defendant to make an extraordinary use of the highway, in derogation of the common right of use. It was thereby exonerated from an action by the city, as a trespasser ab initio, for the bare disturbance of the bed of the street, which would lie, in the absence of such authorization, without proof of special damage.

But when the legislature, by giving the permission, waived this right of action, it did not design to waive or impair the right of action against the company in respect of actual injury sustained by a citizen from the excavation of the street. Nor could it agree that the citizen might receive such injury with impunity and be powerless to obtain redress by appeal to the courts, provided only the company could show that it availed itself of the unusual and hazardous privilege without actual negligence.

The authorization by the city, while simply estopping itself from contending that the bare act of breaking up the street should thereafter constitute the company a trespasser, could not and did not place the company in a more favorable situation, in this respect, than was occupied by the quarry owner or the farmer in the cases cited. Without any grant or legislative permission they had, in their quality of owners, the right to quarry their own stone and cut their own timber on their own land, without being regarded as trespassers. And yet they were held justly liable for injury to their neighbors, arising in the prosecution of these lawful rights, notwithstanding the proof of absence of all negligence in their exercise.

So this company, after the legislative permission, had the right to break up the bed of that street, and as long as no special injury occurred to others, it could not be regarded as a trespasser. But when such injury had been caused, it became justly liable, as the quarryman and farmer were held to be, notwithstanding it might show an absence of all negligence in the construction of the tunnel thus authorized by the legislature.

In *Robbins v. Chicago*, 4 Wall. 676, it was insisted that as Robbins in constructing the area acted under the express orders of the corporation, which by ordinance had required the raising of the grade, he could not be held liable at the suit of the city. "His authority to raise the sidewalk to the new grade," says the court, "is not contested." It proceeds: "Liability of the defendant, however, was not placed upon the ground that he was not authorized to raise the sidewalk. On the contrary, the jury were distinctly told that the gravamen of the charge was not that the defendant was engaged in an unlawful work when he constructed the area; but the court placed his liability upon the ground that he left the area open and without guard to warn those who had occasion to pass in the street, so that the work which was originally lawful became a nuisance, and was unlawful at the time of the injury."

Correctness of that instruction in view of the evidence as reported in the transcript is so manifest that it needs no support."

The assent of Chicago that Robbins should make the improvement was as full as that of the District of Columbia to the construction of the tunnel, but it gave no exemption from responsibility for actual injury caused in the execution of the work.

The present action is not brought directly by the injured party against the company, but by the District of Columbia seeking reimbursement for what it has been compelled to pay to Barnes. Does this circumstance change the principle we have been endeavoring to enforce so that the company can exonerate itself by showing absence of negligence?

It cannot be imagined that the District government, when it authorized the company to make the tunnel with all proper care and precautions, could have designed to abandon or weaken its claim for reimbursement for whatever damages it might be compelled to pay for injuries caused by the excavation. The municipality would unquestionably have refused its assent to the permission asked, if it had been advised at the time that if it should thereafter be compelled to seek by suit reimbursement for the bare amount of a verdict rendered years before (excluding the various charges inevitably attending such a recovery) it would be obliged to enter into a contest with the company and its servants in respect of a defence which would not have been tolerated in a suit brought by the injured party against the company, while the facts were fresh and the entire evidence accessible. There can be no reason why such testimony should be excluded in the one case and admitted in the other, and, indeed, it would appear more unreasonable to allow it to be urged against the municipality, whose bounty bestowed the original privilege which the recipient abused to the great expense and cost of the city, than to admit it against an action brought by the individual whose ill-fortune had occasioned so much trouble.

If an individual or a corporation, conceiving that the grant of the coveted privilege, in this view of the law, is hampered with too great a measure of responsibility, is therefore indisposed to accept the risk which proper attention and care could certainly neutralize, the grantee is at liberty to decline its acceptance; but if it be accepted, the recipient must see to it at his peril that its valuable franchise shall not work injury to others, not favored in the grants from the legislature, but having no other function to perform with respect to the railroad, except to pay fares and on occasions defend its property from casualty or violence.

Third. The defendant also offered to prove irregularities of the ground on Virginia avenue and K street; that the avenue was the more elevated, and that because of the flowage of rain water and the passage of wagons, K street, during the work on the tunnel,

was in a very bad condition. This was really the effect and substance of the extended offer, which was made without any statement of its purpose, and which, so far as we can see from the record, was entirely irrelevant and immaterial. Even with the explanation offered by counsel in the argument we are unable to see how it was admissible, under any issue in the case, and we think the exclusion was proper.

Fourth. There was a further offer "to prove—that the defendant company was under no obligation to erect barricades at the tunnel to prevent accidents."

The language seems to have been taken from an expression of the Supreme Court in 2 Black, 423, where the court says: "Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition," etc. The court was there speaking of Robbins' defence, that the contractor was the responsible party, and the sense of the passage is reached by emphasizing the personal pronoun "he." But as stated in this exception, this was simply an offer on the part of the defendant to establish by evidence before the jury a proposition of law as to the liability of the company to take measures to prevent accidents at the tunnel by erecting barricades. The offer was properly rejected.

Fifth. In the absence of any evidence on the part of the defendant, the instructions of the judge were entirely proper.

The first objection of the defendant, that the instructions were erroneous because they authorized the jury to bring in any verdict (by which we conclude was intended any verdict for the plaintiff), has already been disposed of.

The second objection, that the plaintiff in the case was not entitled in any event to recover against the defendant for interest paid upon the said judgment, nor for any costs paid on account of the said suit of Barnes v. The District of Columbia, did not arise out of anything in the judge's instruction, which simply said "the plaintiff was entitled to recover the amount of the judgment which it has paid," saying nothing of interest or costs.

Nor was the proposition in any manner presented to the court by the defendant for its ruling, nor can we see that it was ever passed on by the court.

In Robbins v. Chicago, 4 Wall. 663, the Circuit Court charged the jury that the city was entitled to recover the amount of the judgment it had paid, with interest, and the Supreme Court affirmed the rulings throughout, including this.

We do not think section 829, Revised Statutes District of Columbia, sustains the contention of the defendant, that such a course would not be proper in this jurisdiction.

The District of Columbia, because of the defendant's default, was obliged to pay in discharge of a judgment against it, a large sum of money, part of which, as it happened, consisted of interest

and costs; and it is simply claiming in this action reimbursement for what it was thus obliged to pay by reason of the default of the defendant. In *National Bank v. Mechanics' Bank*, 94 U. S. 440, the court decided the depositors in a suspended national bank were entitled to receive interest from the bank from the time of the demand for their money, although the Comptroller of the Currency had urged that the statute gave no such allowance. Mr. Justice Swayne adds this language in his opinion: "The plaintiff in this action was entitled *ex cequo et bono* to the money sought to be recovered. Where the right to recover exists in this class of cases, it includes interest as well as principal, unless there is something which would render the payment of the former inequitable."

In 2d Burr. 1087, *Robinson v. Bland*, Lord Mansfield said: "The interest is an accessory to the principal, and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it, and I do not know of any courts in any country (and I have looked into the matter) which did not carry interest down to the last act by which the sum was liquidated."

If the point were therefore properly before us we should decide it against the defendant. Indeed, a strict application of the rulings of the Supreme Court in *R. R. Co. v. Varnell*, 98 U. S. 479, and in similar cases, would perhaps have excluded us from considering others of the questions we have felt it our duty to discuss, because of their public importance.

The judgment below is affirmed.

The Chief Justice and Associate Justices Hagner and James sat in this case.

WESTERN PENNSYLVANIA R. R. CO.'S APPEAL.

(Advance case, Pennsylvania. January 2, 1882.)

A railroad company, authorized by its charter to construct a road from an incorporated city to another point, accepted an ordinance passed by the councils of said city, granting it a right of way up to a certain point therein. It then built its track up to that point, and established there its freight and passenger depots. There was no other act upon its part indicating an intention to fix the terminus at that point:

Held, that the power reposed in the company to locate and establish a terminus had not been exhausted, and that it might, with the consent of the city councils, subsequently extend its line to a point beyond that where its depots were situate.

Independently of the question whether the company had fixed its terminus, the construction of the new track, above referred to, was fully authorized by the Act of April 4, 1868, § 9 (P. L. 69), enabling railroads to construct such branches from their main lines as they may deem necessary to increase their business and accommodate the public,

The construction of such new track by virtue of an ordinance of the city councils, whereby certain provisions were made as to its location and grade, was fully authorized by the Act of June 9, 1874 (P. L. 282), enabling cities to contract with railroad companies for the relocating, changing or elevating of tracks so as to secure the safety of life or property, and promote the interests of the municipality.

The land of a railroad company, consisting of a portion of a disused public canal purchased from the Commonwealth, upon which no tracks are actually laid by the owner, although they are shortly to be laid, is liable to be crossed by the tracks of another railroad company in such a manner as will not interfere with the use thereof by the owner for the construction of a railroad.

APPEAL from a decree of the Common Pleas No. 2, of Alleghany County.

. Bill in equity, between the Western Pennsylvania R. R. Co., complainant, and the Pittsburg and Western R. R. Co., defendant, whereby the company complainant sought to enjoin the company defendant from laying its tracks over the company complainant's property. An answer being filed, the cause was referred to R. B. Carnahan, Esq., as examiner and master, who found the facts to be substantially as follows:—

The company complainant is the owner of a certain disused part of the Pennsylvania Canal between Federal Street and the Alleghany River, in the city of Alleghany. Its title thereto is derived through divers mesne conveyances from a sale by the commonwealth of the said canal bed. No tracks have hitherto been laid by the company complainant on said canal bed, but the bill averred that the time had come when it would be expedient and necessary for the company complainant to lay such tracks. The company defendant became by purchase in 1879 owner of the property and franchises of the Pittsburg, New Castle, and Lake Erie R. R. Co. This last-named company had been incorporated with power to construct a narrow-gauge road from Alleghany City to Wurtzburg, in Lawrence County. An ordinance was passed in 1877 by the Councils of Alleghany City, granting the last-named company a right of way as far west as the east line of Sandusky Street. This ordinance the company accepted, and proceeded to build its road, which was marked as extending as far west as Sandusky Street. The road was still incomplete at the time of the sale to the company defendant. The company defendant, immediately after its purchase, proceeded with the construction of the road as already marked out, and, purchasing a lot on the east side of Sandusky Street, erected there its passenger and freight depots, which, on completion of the line, it began to use. There was no specific act of the Board of Directors shown fixing the western terminus of their road at the site of their depots.

In 1880 the Councils of the City of Alleghany passed an ordinance granting to the company defendant a right to lay its tracks along River Avenue by the Alleghany River westward of

Sandusky Street, to the western limits of the city. This ordinance the company defendant accepted, and thereupon proceeded to build its tracks along River Avenue, proposing to continue them so as to cross complainant's canal property by a bridge twenty-one feet high. The company complainant sought to restrain the crossing of its property by the company defendant's tracks in the manner aforesaid.

The company complainant claimed that the company defendant had no right to construct its road westward from Sandusky Street, because it had fixed upon the east side of that street as its terminus. The master was, however, of opinion that the mere act of the company defendant's predecessor in title in accepting the ordinance of 1877, and of the company defendant in constructing its line up to and its depots on the east side of Sandusky Street, did not fix its terminus at that point. He was of opinion, moreover, that the track built by the company defendant westward of that point, in pursuance of the ordinance of 1880, was a branch of the main line of its road, and, as such, fully authorized by the Act of April 4, 1868, § 9 (P. L. 62), and further that it was authorized by the Act of June 9, 1874 (P. L. 282). He reported in addition that there was no reason why the company defendant should not construct its tracks over the property of the company complainant by the bridge as proposed, and therefore recommended that the bill be dismissed.

Exceptions were filed to this report, and were substantially dismissed by the Court in an opinion by Ewing, P. J., a decree, however, being entered fixing the height of the company defendant's bridge over the company complainant's land at twenty-one feet, requiring that the bridge should rest on abutments entirely outside the company complainant's land, and granting to the company complainant the right to make use of the company defendant's bridge to cross the tracks thereon at grade upon such terms as should be specified by the Court when the complainant resolved to make such crossing.

The company complainant thereupon took this appeal, assigning for error, *inter alia*, the dismissal of the exceptions to the master's report and the entry of the decree as above.

Hampton & Dalzell, for the appellant.

By the city ordinance of 1877 and the assent of the company defendant a contract was constituted, which finally fixed and established the western terminus of the road at Sandusky Street. *Birmingham Pass. Ry. Co. v. Borough of Birmingham*, 1 Smith, 41.

The city might have refused permission, the company might have declined to accept; but they did not. The election was made, and is complete and binding on both parties, and the power was exhausted to make a new location or establish another terminus. The rule of the common law is that "if a man determines his election, it shall be determined forever." *Com. Dig., Tit. Election, C.*

2; Rol. Abr. 726, I. 15; *State v. Turnpike Co.*, 10 Conn. 157; *Turnpike Co. v. Hosmer*, 12 Conn. 361; *Turnpike Co. v. Turnpike Co.*, 2 Swan, 282; *Mason v. Brooklyn City & N. R. Co.*, 35 Barbour, 373.

Further, it is necessary under the first section of the Act of 1868, and the 10th section of the Act of 1849, for a railroad company accurately to define their location and termini. The law regards them as indicative of the beginning and ending of the railroad, and demands that they shall be certainly defined. Road in Lower Merion, 8 Smith, 66; Bean's Road, 11 Casey, 280; Road in Lower Salford, 1 Casey, 524.

The reasoning of these cases applies with greater force to railroad companies, for they locate their lines and establish termini independently of the Courts, and the acts giving them corporate life should be more stringently construed than the Acts authorizing the laying out of township roads.

It is argued that the officers of the company defendant did not intend to fix the terminus at the line of Sandusky Street by accepting the ordinance. But a contract thus free from doubt must be construed independently of parol proof, and cannot be altered or varied upon the opinion of witnesses who were present when it was made. "Where there is no ambiguity in an agreement, parol evidence of the intention of the parties is inadmissible." *Brightly's Dig.* 990; *Fisher v. Deibert's Amn'r*, 4 Smith, 463.

The proposed road could not be built as an extension of the main line. Although a railroad may use some discretion in constructing its road, it cannot, after the track is located, make a relocation or abandon a route once adopted for a more eligible one, nor use this power for making an extension. Note to p. 295 of *Green's Brice's Ultra Vires*; *Peavey v. Calais R. R. Co.*, 30 Maine, 498; *Morris & Essex R. R. Co. v. Central R. R. Co.*, 2 Vroom, 205; *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 340; *Bruning v. N. O. C. & B. Co.*, 12 La. An. 541.

Nor could it be built as a branch under the Acts of 1849 and 1868. A branch is an independent road, which, though incident to the main line, is wholly separate and distinct from the stem which it feeds. The idea of a branch which shall be a prolongation of the main line is expressly excluded in terms from the general branching power given by the Act of 1868.

Finally, the lacking corporate power is not supplied by the Act of June 9, 1874 (P. L. 282), whereby municipalities are authorized to enter into contracts with railroad companies for the purpose of relocating railroads already located within their limits, for the Act has no relation to either extensions or branches.

It necessarily follows that no authority exists in the defendant company to appropriate the plaintiff's property under the right of eminent domain.

A. M. Brown, for the appellees.

The company defendant, under its delegated right of eminent domain, has corporate power to take and appropriate private property, subject only to the limitation as to use of the public highways. It had all this power independent of the municipal authorities. By accepting the ordinance passed by the Councils of the city of Alleghany, it had further the right to occupy the streets of the city. *Getz's Appeal*, 10 Weekly Notes, 453.

The road was not an extension but a branch. It is not necessary that a branch should go at right angles to the main line. Mayor, etc., of *Pittsburg v. The P. R. R. Co.*, 12 Wr. 355.

But the power of the defendant to construct its road to the western line of the city may be sustained on other grounds. The Act of June 9, 1874, authorized the defendant company and the city to make the contract contained in the ordinance of 1880. That Act gives to municipal corporations the power to relocate railroads within their limits, and for that purpose they can change a prior contract with a railroad company, or make an entirely new one. *Duncan v. P. R. R. Co.*, 7 Weekly Notes, 551.

Railroad companies are incorporated with a view to the public good they may subserve, and, with the accommodation of the public in view, they will not be compelled to permanently locate their property at a particular place in order to promote private advantage. A charter fixing the terminus of a railroad at or near a certain point gives the company a large discretion, which will not be interfered with except for bad faith. *Constitution of Penna.*, Art. XVII., sec. 1; *Marsh v. Fairbury R. R. Co.*, 14 Am. Law Reg. 561; *Marsh v. F. P. & N. W. R'y Co.*, 12 Id. 390; *Fall River Iron Works Co. v. Old Colony R. R. Co.*, 2 Id. 699; *Parke's Appeal*, 14 Smith, 137.

A corporation, by its delegated power of eminent domain, may take the property of another corporation upon making compensation; 1 Redf. on Railways, §§ 1, 4, 10; *Vermont v. B., C. & M. R. R. Co.*, 25 Vt. 433; *P. & B. R. R. Co. v. City of Philadelphia*, 11 Wr. 329; *Com. v. Penna. Canal Co.*, 16 Smith, 47; *In re Towanda Bridge Co.*, 10 Norris, 216; *Constitution of Penna.*, Art. I., sec. 10; Art. XVI., sec. 3; *Illinois Central R'y Co. v. United States*, 20 Law Rep. 630.

January 2, 1882. The Court.—The right of the Pittsburg and Western R. R. Co., under its charter and ordinances of the city of Alleghany, to locate and construct its railroad along the Alleghany and Ohio rivers, within said city, from the eastern to the western boundary thereof, has been so conclusively shown by the learned master, in his able and exhaustive report, that it is unnecessary to add anything to the reasons given or authorities cited in support of that conclusion.

The Pittsburgh, New Castle, and Lake Erie R. R. Co., which was succeeded in title by the appellee, was incorporated in September, 1877, under the provisions of the Act of April 4th, 1868, and its supplements, with power to construct a narrow-gauge railroad from Alleghany City to the village of Wurtemburg, in Lawrence County, Pa.

The company immediately after its organization commenced the work of construction, obtained from the city of Alleghany the right of way for a single or double track "along the bank of the Alleghany River, or upon River Avenue from the eastern terminus of the city to the east end of Sandusky Street;" and in less than two years had completed the greater part of its road outside the city limits. In August, 1879, all its property, rights, franchises, etc., were sold by the sheriff and duly conveyed to the purchasers, who associated themselves as the Pittsburgh and Western R. R. Co. by which name they were incorporated in October of that year. The new company having thus succeeded to all the property, rights, and franchises of the Pittsburgh, New Castle and Lake Erie R. R. Co. took possession of the road and proceeded to complete the same.

In the early part of January, 1880, that portion thereof between the eastern line of Sandusky Street and the borough of Etna was opened for trade and travel.

The main contention of appellant was that the Pittsburgh and Western R. R. Co. has no authority to extend its road west of the eastern line of Sandusky Street, because its predecessor in title had located, marked, and determined the route of the road, and by accepting the ordinance granting the right of way to the east line of Sandusky Street had selected and finally fixed that point as its western terminus; and also because the appellee, after acquiring title, had completed the road to that point, purchased property and established its terminal depot there. On the other hand it was contended that the western terminus of the road had never been definitely settled either by the original company or its successor; that it had always been the fixed purpose of both companies, while they respectively owned and controlled the road, to reach the western boundary of Alleghany City as soon as the necessary consent thereto of the city councils could be obtained.

After a careful consideration of the evidence bearing on this subject, the learned master found in favor of the appellee; and in this we think he was clearly right. Without referring specially to the grounds on which his conclusions are based it is sufficient to say that they are entirely satisfactory. The power to locate and establish the western terminus of the road in Alleghany City had not been exhausted by any act of appellant or its predecessor; and by virtue of its charter and the ordinance of September 9th, 1880, granting the right of way to the appellee, it is clearly authorized

to construct and operate its road along the bank of the Alleghany and Ohio rivers, or upon River Avenue to the western boundary of the city, subject to the conditions and restrictions imposed by the ordinance last mentioned.

It is true the original company was chartered to construct a road "from the city of Alleghany," etc., but that clearly means from any point within the city. Moreover, companies chartered either under the Act of 1849 or the Act of 1868, are expressly authorized to extend their respective roads into any city, town, or village named in their charter as a terminal point, provided that in the case of an incorporated city the streets, lanes, and alleys thereof shall not be occupied by any such railroad without the consent of the corporate authorities first had and obtained. In this case such authority was expressly given by ordinance.

Independently of the foregoing conclusion, and on the assumption that the eastern line of Sandusky Street had been selected and fixed by the company as the western terminus of its road, the learned master also held that the appellee is authorized to construct its road from the east line of Sandusky Street to the western boundary of the city, either under the power contained in the ninth section of the Act of 1868, "to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public," or under the provisions of the Act of June 9th, 1874, P. L. 282, in connection with the ordinance of September 9th, 1880.

The branching power given by the 9th section of the Act of 1868, is sufficiently broad and comprehensive to authorize the construction of the road in question as a branch; and there is no valid reason why it may not be constructed from the terminus as well as from any other point on the main line of the road. The letter as well as the spirit of the section justifies the construction put upon it by the master.

The Act of 1874 declares, "That the proper authorities of any county, city, town, or township of this State, respectively, be and they are hereby authorized and empowered to enter into contracts with any of the railroad companies, whose roads enter the limits, respectively, whereby the said railroad company may relocate, change, or elevate their railroads within such limits or either of them, in such manner as in the judgment of such authorities, respectively, may be best adapted to secure the safety of lives and property, and promote the interest of said county, city, town, or township; and for that purpose the said authorities shall have power to do all such acts as may be necessary and proper to effectually carry out such contracts," etc. This is a general law, manifestly intended to provide for a class of cases in which, before the adoption of our present Constitution, special legislation was frequently invoked. As the natural result of the rapid development

of our material resources and growth of population, especially in our larger cities, the public interest, convenience, and safety from time to time require changes both in the location and construction of railroads. The Legislature, recognizing these facts, authorized the proper authorities of the respective municipal districts mentioned in the Act to enter into contracts for making such changes as in their judgment may be best adapted to secure the safety of life and property, and at the same time promote the interest of the particular municipality. The ordinance of September, 1880, which was accepted by the appellee and forms a contract between it and the city of Allegheny, is carefully drawn, and its provisions well guarded with the view of securing the several objects contemplated by the Act of 1874. If, in the judgment of the city councils, the terms and conditions on which the right of way was granted to the appellee were best calculated to secure the safety of life and property and promote the interest of the city, their right to make the contract cannot be questioned; and it is equally clear that the appellee was authorized to accept and carry out the provisions of the ordinance.

We think, therefore, that on either of the grounds stated and discussed at length by the master, the appellee has the necessary corporate authority to construct its road from the eastern to the western boundary of the city on the route specified in the ordinances granting the right of way.

The corporate of the appellee, thus to locate and construct its railroad, being settled, the next question is whether for the purpose of either a grade or overhead crossing, it has a right to appropriate any part of the strip of land claimed by appellant under title derived from the Commonwealth. The validity of appellant's title, and its right to hold and use the strip of land known as the canal lot for railroad purposes cannot be doubted. It has been definitely settled, by an unbroken line of decisions, that the Commonwealth acquired an absolute estate in perpetuity in the land taken and occupied for canal purposes; and by virtue of the Act authorizing the sale of the main line of the public works and sundry mesne conveyances, that title, which for all practical purposes, was a fee simple, became vested in the appellant company (*Com. v. McAllister*, 2 Watts, 190; *Haldeman v. Pa. R. R. Co.*, 14 Wright, 425; *Craig v. Alleghany City*, 3 P. F. Smith, 477; *Robinson v. West Penna. R. R. Co.*, 22 P. F. Smith, 316). By subsequent legislation, the appellant was authorized to construct and maintain on the bed of the canal a railroad, with branches, etc.; while the company appellant is thus invested with an absolute title in fee to the canal lot, with the right to use the same for railroad purposes, it by no means follows that its rights are so sacred or exclusive that, under the proper exercise of the power of eminent domain, its property may not be subjected to an easement in favor of the

appellee or any other railroad company. If a crossing can be effected, either at grade or by means of a viaduct, without materially interfering with appellant in the exercise and enjoyment of its franchise, the right to make such crossing, upon paying or securing the payment of adequate compensation, cannot be doubted; as yet appellant has not constructed a branch road at the point of the proposed crossing, but it is no doubt practicable to do so; and it is averred in the bill that in the judgment of its Board of Directors, the time has come when a track should be built from the low water mark on the Alleghany River, to the Pittsburgh, Ft. Wayne, and Chicago Ry., by means whereof the company will have an outlet for its traffic to and from the river as the Commonwealth had when the canal was in operation. Assuming, then, that a transfer track will forthwith be constructed on the canal lot, from the Pittsburgh, Ft. Wayne, and Chicago Ry. to low water mark on the river, will the proposed crossing, by a viaduct at least twenty-one feet in the clear above low water mark, supported by abutments located entirely outside the lines of appellant's lot, materially interfere with the use and enjoyment of such transfer branch? The decided weight of the testimony is that it will not; and the finding of the Master, concurred in by the Court, is to the same effect. The decree is accordingly so framed that the appellee, in constructing its bridge across the lot in question, is required to place the same "at such an elevation as to leave at least twenty-one clear feet between the lowest part of said bridge and the datum line of the city of Alleghany." The decree further provides, "that said bridge shall rest on abutments entirely astride of the lines of plaintiff's property, and shall not be supported by any pier or other support resting on plaintiff's land; that defendant's road and the whole width of ground taken at the crossing of plaintiff's land shall not exceed twenty-four feet, and the length thereof shall be the width of plaintiff's land, which is sixty-two feet, more or less," and, in view of the future practicability or necessity for the appellant company to cross appellee's road at grade, the Court has also very properly secured to it that privilege, coupled with the right to make application to the Court for a decree defining the terms and conditions upon which such grade crossing shall be constructed and maintained.

After a careful examination of the record, we find nothing in the decree of which the appellant has any reason to complain.

Decree affirmed and appeal dismissed at the costs of the appellant.

Opinion by STERRETT, J.

GORDON and GREEN, JJ., absent.

Although the decision of the above case turned to a very great degree upon the peculiar facts, it will, nevertheless, be of general interest to the profession as furnishing some guide as to what is a sufficiently decisive act on the part of a railway company in fixing the location of its line or terminus

to exhaust its powers in that respect. Some other questions of interest were also touched upon. The aim of this note is to group for convenient reference the principal cases on analogous questions which have been decided in this country and in England.

Where the charter of a railroad company empowers it to construct a line of road, "beginning or ending at" a place, or "beginning from," or "running to" it, these terms are construed as inclusive and authorize a location within the place. *Hazlehurst v. Freeman*, 53 Ga. 244; *Tenn. & A. R. R. Co. v. Adama*, 8 Head, 596; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Comm. v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Moses v. Pita*, Ft. W. & Chicago R. R., 21 Ill. 516; *Farmers' Turnpike Road v. Coventry*, 10 Johns. 399; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 554; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 348; *Long Branch Com'rs v. West End Ry. Co.*, 2 Stew. (N. S.) 566; *National Docks Co. v. Central R. R. Co.*, 5 Stew. (N. S.) 785.

So of the terms "at," or "near," or "at or near," and the like. *Attorney Gen'l v. West Wisc. R. R. Co.*, 36 Wisc. 466; *De Long v. Schemmel*, 58 Ind. 64; *Fall River Iron Works v. Old Colony & F. R. R. Co.*, 5 Allen, 221; *State v. Hudson Tunnel R. R. Co.*, 9 Vroom, 548; *Central R. Co. v. Penna. R. Co.*, 5 Stew. (N. S.) 755.

So where the authority is to construct the line "between" two places. *Morris & E. R. Co. v. Central R. Co.*, 3 Vroom, 205. And a very large discretion is allowed to the railway company in determining where its terminus shall be fixed, which will not be controlled by the courts unless for very clear excess of power, or unless bad faith be shown.

Having exercised this discretion, however, the corporation has exhausted its powers and cannot relocate its terminus without further legislative authority. *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Penn. St. 468; *Turnpike Co. v. Hosmer*, 12 Conn. 361; *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. 378; *People v. N. Y. & H. R. Co.*, 45 Barb. 73; *Doughty v. Somerville & E. R. Co.*, 1 Zab. (N. J.) 442; *Brigham v. Agricultural Branch R. R. Co.*, 1 Allen, 316; *Blakemore v. Glamorganshire Canal Co.*, 1 My. & Keene, 154; *Works v. Junction R. R. Co.*, 5 McC. 425; *Peavy v. Calais R. R. Co.*, 30 Me. 498; *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 840; *Brunig v. N. O. C. & B. Co.*, 12 La. 541. But see *Virginia & T. R. Co. v. Lovejoy*, 8 Nev. 100; *Ex parte South Carolina R. R. Co.*, 3 Rich. Law (S. C.) 484; *South Carolina R. R. Co. v. Blake*, 9 Rich. Law, 228; *Duncan v. Penna. R. R. Co.*, 7 Weekly Notes of Cases (Phila.) 551.

No case lays down what exactly shall be deemed a definitive decision by a railroad company on the location of its terminus. The principal case as a negative authority upon this point cannot but be of value.

The power of a railway company to construct branches depends altogether upon the statutes from which it derives its powers. *Baltimore & H. Turnpike Co. v. Union Ry. Co.*, 85 Md. 224; *Pittsburg v. Penna. R. R. Co.*, 48 Pa. St. 355; *Peatterville v. Galena & S. W. R. R. Co.*, 43 Wisc. 493; *State v. St. Louis R. C. & N. R. Co.*, 8 Mo. App. 180. Generally the power to construct branches expires with the power to build the main road. *Atlantic & Pac. R. R. Co. v. St. Louis*, 66 Mo. 228. In the principal case the statute invoked to authorize the construction of the branch clearly conferred a broader power.

A municipality has without special legislative sanction no power to authorize, prevent, or control the laying of the tracks of a railroad company through its streets. *Petter v. Johnson*, 56 Md. 139; *Davis v. New York*, 14 N. Y. 506; *People v. N. Y. & N. H. R. R. Co.*, 45 Barb. 78; *People's Ry. Co. v. Memphis R. Co.*, 10 Wall. 88; *Parry v. New Orleans M. & C. R. Co.*, 55 Ala. 413; *Atlantic & Pac. R. Co. v. St. Louis*, 66 Mo. 228. But this power may be conferred upon it and frequently is. *Clarke v. Blackmar*, 47 N. Y. 150; *Brown v. Duplessis*, 14 La. Ann. 842; *Chicago & N. W. R. R. Co.*, 91

Ill. 251; Gurney v. Chicago, B. & Q. R. Co., 92 Ill. 31; Edwardsville R. R. Co. v. Sawyer, 93 Ill. 877.

And then it is at liberty to impose such restrictions upon the laying of the track as it may deem wisest. Council Bluffs v. K. C., St. J. & C. B. R. Co., 45 Iowa, 338; Pacific R. R. Co. v. Leavenworth City, 1 Dillon, 898; New York & H. R. R. Co. v. New York, 1 Hilton, 562; Jersey City & B. R. Co. v. Jersey City & H. Horse Car Co., 5 C. E. Green (N. J.) 61. Such a power is conferred upon municipalities in Pennsylvania.

That the company complainant had a fee in the canal property purchased by it is settled by the following authorities: Haldeman v. Penna. R. R. Co., 50 Pa. St. 425; Robinson v. West Penn. R. R. Co., 73 Penna. St. 316; Craig v. Alleghany City, 53 Pa. St. 477; Commonwealth v. P. & C. R. R. Co., 24 Pa. St. 159. This, however, did not prevent the company defendant from laying its tracks over the canal bed in the manner proposed, nor did it entitle the company complainant to compensation. Where a railway company's location is subjected to a railway crossing in a manner not substantially interfering with the use thereof or causing damage to the road bed, the property is not taken in a constitutional sense. N. Y. & H. R. R. Co. v. Forty-second St. & G. St. F. R. Co., 50 Barb. 309; L. S. & M. S. R. Co. v. C. S. & C. R. Co., 30 Ohio St. 604. Though of course a right to such compensation may be given by statute. Metropolitan R. R. Co. v. Quincy R. Co., 13 Allen, 262; Boston & W. R. Co. v. Western R. Co., 14 Gray, 258; Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 88.

PHILIP HANSON HISS, and SUSAN HISS, his Wife, and others

v.

THE BALTIMORE AND HAMPDEN PASSENGER RY. Co. and others.

(62 Maryland Reports, 262. July 15, 1879.)

The complainants in their bill alleged, that they were the owners of lots abutting upon D. street or M. avenue, between S. and B. streets in Baltimore County; that the bed of said street or avenue belonged to them, and that the same was a private way. That the defendants without their assent, and claiming incorporation under, and authority by, the Act of 1865, ch. 32, were laying a railway track along said street or avenue to the complainant's injury, without having condemned the right of way, or made any compensation to them for their interest in the soil and the damages incurred. The bill then prayed for an injunction. The answer admitted the complainant's title, but denied that the said street was a private way, and charged it to be a public street or highway, and a very important thoroughfare. It admitted the laying of the railway track, but alleged it was only a horse car railway, which their charter fully authorized, and the defendants disavowed and forever renounced all claim to place a steam railway on said street, and insisted, that the law was wholly within legislative powers. The admissions and proof, showed, that the street or avenue in question had been thrown open to public use, and had been accepted and used by the public for many years; that lots had been sold calling for said street, and that it had been used for many years as a thoroughfare for all the ordinary modes of transit.

Held:

1st. That the complainants were estopped from denying it was such street

or highway for all the purposes for which it might be fairly inferred that the dedication was intended.

3d. That the Legislature had the power to confer upon the defendants the right to construct and use a horse car railway on said street.

8d. That it was not necessary to determine whether under said Act of 1865, ch. 32, a steam railway, if attempted to be laid, would be without sufficient legal warrant, as the defendants were not laying claim to any such right, but were building a horse car railway only, and renounced all claim to lay any other.

4th. that it did not necessarily follow that said act was wholly unconstitutional because something may be attempted under it, and may in the broad language of the Act seem to be covered by it, which the Legislature could not authorize. If the law will admit a construction which will justify that which was being done under it, and which by the terms of the law was clearly warranted by it, to that extent the law ought to be sustained.

5th. That the terms of the Act included the right to build a horse car railway, and such railway along a public street or highway, is not a new and additional servitude on the land.

After the filing of the bill, the time within which, by the terms of the Act of 1865, ch. 32, the defendant was required to complete its road, expired. No supplemental bill was filed suggesting that as an additional reason for the injunction, and subsequent to its expiration the commission to take testimony was issued and executed, and the bill was dismissed by consent pro forma for the purpose of an appeal. *Held:*

1st. That under such circumstances, this Court on review must consider all the proceedings as relating to the time of filing the bill, and decide the cause according to the actual rights of the defendants at the time they were, at the instance of the complainants, arrested by injunction from proceeding with a work which was then legitimately authorized.

2d. That the injunction granted originally on the complainants' prayer, ought not to have been granted when it was granted, therefore the final order dissolving it was correct.

8d. That to hold otherwise on this point would in effect be declaring a forfeiture of the defendant's charter in an incidental way, without any proceedings instituted for that purpose.

APPEAL from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J. BOWIE, ALVEY and IRVING, J.

Bernard Carter, for the appellants.

If the Act of 1865, ch. 32, sec. 6, authorizes the appellee, the Railway Company, to construct its road upon Maryland avenue, in front of the property of the appellants, without acquiring by grant or condemnation the right to do so, it is in this respect unconstitutional.

We make no question as to the law laid down in the cases of *White v. Flannigan*, 1 Md. 525, and *Moale v. Mayor and City Council of Baltimore*, 5 Md. 314. But these cases do not establish the right of the Railway Company to lay its tracks on Maryland avenue in front of our property without condemnation or grant of the right.

These cases are expressly confined by the decisions in them to conveyances of lots in the city, which call for streets in the city, and have no application to conveyances in the county binding on roads.

And it will be seen that in the case of *Moale v. Mayor and City Council of Baltimore*, 5 Md. 314, it was conceded that there must be condemnation of the street, though it is said that the damages awarded would be nominal, that is damages for condemnation of it as a street.

When the question of dedication is considered therefore, to learn to what extent the dedication goes, we are to look to the uses designed to be made at the time of dedication, and the dedication goes no further. *City of Cincinnati v. White's Lessee*, 6 Peters, 432.

Where a road, or avenue, is laid out in the county by private owners, though permissively open to the public to drive and ride over, the owners of property binding upon such road own the fee to the centre of the road, and the public have at the most only the right to make such use of it as was designed at the time it was so thrown open to the public, and this does not give the Legislature the right to grant to any corporation the right to lay down railroad tracks, or make any other such use of the road, without the grant of such right from the co-terminous proprietors, or by acquiring such right by condemnation. 22 Vermont, 484, 495; 3 Kent, 433; *Presby. Soc. v. Auburn and Rochester R. R.* (Nelson, Ch. J.), 3 Hill, 568; *Williams v. N. J. R. R.*, 16 N. Y. 116; *Stetson v. Chicago R. R.*, 75 Ill. 74; *Cox v. Louisville R. R.*, 48 Ind. 178; *Gray v. St. Paul R. R.*, 13 Minnesota, 315, 318, 320; *Cooley on Constl. Lim.* 546-556.

The application of the case of *Peddicord v. Balto. & Cantonsville R. R.*, 34 Md. 480, was expressly limited to the facts of that case, and there the right of way has been condemned by the Turnpike Co. This case, therefore, is no authority for the facts of the case now before the Court; whereas all that the evidence shows as to dedication is that the public were permitted to ride and drive over the road, which is proved to have been carried out by Mr. Smith himself.

But by the true construction of the 6th sec. of the Act of 1865, ch. 32, it was not intended by the Legislature to give the railway company the right to use the roads and streets therein mentioned, without first obtaining the assent of the property-holders binding thereon. The only design was to confer the right so far as the public easement was concerned, leaving the company to deal with the private rights of individuals in the usual way. *Gray v. St. Paul R. R.*, 13 Minnesota, 315, 318, 320; *Presby. Soc. v. Auburn and Rochester R. R.*, 3 Hill, 569; *Williams v. N. J. R. R.*, 16 N.

Y. 111; *Williams v. Nat. B. P. R.*, 21 Missouri, 583, 584; *Balt. and Havre-de-Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 231.

In the absence of such a section the right to use the roads and streets would not have been implied. *Springfield v. Conn. R. R. Co.*, 4 Cushing, 63. Hence the section.

By the acts of 1865, ch. 32, and 1868, ch. 121, the company has no right to do any work necessary to complete the road after January 1, 1878. *Regina v. London, etc., R. R.*, 6 Eng. Law and Eq. 220; *Plymouth R. Co. v. Caldwell*, 39 Pa. 340, 341; 1 Red. on R. 393; *Peavy v. Calais R. R.*, 30 Maine, 501; 1 Red. on Railways, 239, 240.

Therefore, the injunction should have been granted instead of the bill being dismissed.

On the question of jurisdiction, see *Mayor, etc., of Balt. v. Ap-pold*, 42 Md. 442.

L. L. Conrad and D. G. McIntosh, for the appellees.

Maryland avenue lies in Baltimore County, and runs from the north side of North avenue, northward to Huntington avenue, also in Baltimore County. North avenue is the northern boundary of Baltimore City, and both that and Huntington avenue are admittedly public streets.

Across Maryland avenue, at right angles with it, between North avenue and Huntington avenue, run a series of cross streets, which in this order northward are known as Denmead, Mankin, Brown, Shirk and Sunwalt streets. Maryland avenue, between Mankin and Sunwalt streets, three squares, is the part of Maryland avenue in controversy in this case.

Maryland avenue has become a public way by derivation from two sources.

1st. Dedication.

2d. By virtue of certain proceedings taken by the County Commissioners under the Act of 1874, ch. 441.

Dedication is defined to be an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public. The interest which the public thus acquires, is merely an easement or right of passage over the soil. Angell on Highways, sec. 132.

No particular formality is required to create a dedication. It may be made either with or without writing, by any act of the owner, such as throwing open his land to the public travel or platting it, and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate, or an acquiescence in the use of his land for a highway; or his declared assent to such use will be sufficient. The vital principle of dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been

made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses, opening into an ancient street at each end, and sells or lets the houses, that is instantly a highway. If accepted, and used by the public in the manner intended, the dedication is complete. Dedication, therefore, is a conclusion of fact to be drawn from the circumstances of such particular case; the sole question as against the owner of the soil being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public as a highway. Angell on Highways, sec. 142.

Dedication to the public use may arise out of a variety of facts and circumstances, which in some cases exist separately, and in others concurrently. In the case at bar almost every form, certainly all the ordinary and usual forms of fact and circumstances which have been held to create a dedication, will be found to exist. *White v. Flannigan*, 1 Md. 540; *Parker et al. v. Smith*, 17 Mass. 415; *Moale v. Mayor and City Council*, 5 Md. 323; *Hawley v. Mayor and City Council*, 33 Md. 280.

So dedication may arise out of other circumstances. In *Rex v. Lloyd*, Lord Ellenborough said: "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public." *Rex v. Lloyd*, 1 Campb. 262; *Surrey Canal Co. v. Hall*, 1 Scott's New Rep. 264—reported also in *Manning & Granger's Rep.* 392; *Regina v. Petrie*, 4 Ellis & Blackburn, 743 (marginal page); *Jarvis v. Dean*, 3 Binghams, 448.

Assuming, therefore, as established, that Maryland avenue, by dedication and otherwise, is, and was, a public street, avenue, or road, of Baltimore County in Baltimore County, the only remaining question presented is, whether the respondent company had power, under its charter, to lay down its tracks thereon. The answer to this question is contained in sec. 6 of the act of 1865, ch. 32. The power there granted is of the most absolute and unrestricted character. No assent of the County Commissioners is required, or other formality. As regards "branches or lateral railways," contemplated by sec. 8, the assent of the County Commissioners is required, but not as regards the main track.

But were it otherwise, the complainants have no standing which entitles them to contest the company's performance of its duty, or its violation of its rights, under its charter, as respects the public highways of the county. The proper and only remedy in such a case is a criminal indictment against the company for obstructing the highway. The complainants, unless they can show special

damage, distinct in degree and kind from that suffered by all other members of the community (in which case an action on the case is their appropriate remedy), have no civil remedy for the obstruction of the highway. *Houck v. Wachter*, 34 Md. 269.

One claim made by complainants' bill is, that, even assuming the easement of Maryland Avenue to be vested in the public, nevertheless that easement is restricted to the proper use of the avenue as a highway; that the use of said street by a passenger railway is a new burden laid on the easement; and, therefore, a violation of complainants' rights as owners of the naked fee of the bed of the street.

In reply to this claim, we refer the Court to the case of *Peddinord v. Baltimore, Catonsville, etc. R.*, 34 Md. 480; *Angell on Highways*, secs. 243, 245; 2 *Dillon on Corps.*, secs. 555, 557, 564, 566; 6 *Wharton*, 25; 27 *Penn. St.* 339, 354; *High on Injunctions*, sec. 528; *Lansing v. Smith*, 8 *Cowen*, 146.

In conclusion, we have only to add that Maryland avenue is situated in the midst of a populous community—is almost as numerously bordered by dwellings as Charles street; and if the complainants have, as they claim, a right to close it up or restrict its uses to their own benefit, other proprietors of lots along its line have fallen into a trap which they little dreamed to exist, in law or in fact, when they purchased the houses they occupy.

IRVING, J., delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court for Baltimore County, dissolving an injunction and dismissing the bill of the appellants. The bill charges, that the appellants are the owners of the lots abutting upon Decker street or Maryland avenue, between Shirk and Brown streets, in Baltimore County; that the bed of said street or avenue belongs to the complainants, and that the same is a private way. It further charges, that the appellee, the Passenger Railway Company, without the assent of the complainants, and claiming incorporation under, and authority by, an Act of the Legislature passed in 1865, being chapter 32, is laying a railway track along said street or avenue to their injury, without having condemned the right of way or made any compensation to them for their interest in the soil and damages incurred; the bill then prays for an injunction. The answer admits title, but denies that the said street is a private way, and charges it to be a public street or highway, and a very important thoroughfare. It admits the laying of the railroad track, but alleges it is only a horse car railway, which their charter fully authorizes, and defendants disavow and forever renounce all claim to place a steam railway on said street, and insist that the law is wholly within legislative powers.

The case presents two questions: 1. Is Decker street or Mary-

land avenue a public street and highway? 2. Is the authority given the railway company by their charter, Act of 1865, ch. 32, constitutionally imparted? In other words, had the Legislature power to authorize the construction of such railroad in and along said street or highway?

1. From the admissions of record, the proof in the cause, and the concession at bar, it is clear that the street or avenue in question has been thrown open to public use, and has been accepted and used by the public for many years; that lots have been sold calling for said street; that it has been used for very many years as a thoroughfare for all the ordinary modes of transit; so that we regard the appellants as estopped from denying it is such street or highway, for all the purposes for which it may be fairly inferred that the dedication was intended. *White v. Flannigan*, 1 Md. 540; *Hawley et al. v. Mayor and City Council*, 33 Md. 270; 6 Peters, 431.

2. Was the Act of 1865, ch. 32, within the scope of legislative authority? Has the Legislature imposed a new servitude on the appellants' land, and added a burden not contemplated in the dedication, or reasonably incident to its use as a highway? This is a question which has been much debated, and has been decided very differently in the various States.

Judge Dillon, in his work on *Municipal Corporations*, Vol. II., p. 675 (2d edition), says that "the weight of judicial authority at present is that where the public have only an easement in streets, and the fee is retained by the adjacent owner, the Legislature cannot, under the constitutional guaranty of private property, authorize a steam railroad to be constructed thereon against the will of the adjoining owner, without compensation to him. In other words, such railway, as usually constructed and operated, is an additional servitude." He adds that as to horse car railroads it is mostly held that they "do not create a new burden, hence the Legislature is not bound to, though it may, provide for compensation to the adjoining proprietor."

Denying that such distinction ought to be drawn, and is the law here, the counsel for the appellants contends, that the Act of 1865, under which the appellees claim their authority, gives an unqualified right to build any kind of railway, and that as a steam railway may be constructed under that Act, the law could not be constitutionally passed; and is, therefore, void. It is not necessary for us to determine whether a steam railway, if attempted to be laid, would be without sufficient legal warrant, which Judge Dillon says, notwithstanding the preponderance of decisions, is "still the subject of fair debate;" for the appellees are not laying claim to any such right. On the contrary, they are building a horse car railway only, and renounce all claim to lay any other, and make that disclaimer a part of their answer that they may be forever bound thereby.

It does not necessarily follow that the Act is wholly unconstitutional because something may be attempted under it, and may, in the broad language of the Act, seem to be covered by it, which the Legislature could not authorize. If the law will admit a construction that will justify that which is being done under it, and which, by the terms of the law, is clearly warranted by it, to that extent the law ought to be sustained. All intendments will be made in favor of the constitutionality of a statute, that is not necessarily, by its provisions, unconstitutional. If, in this case, that which the appellees are doing under their charter is warranted by their charter, and within the power of the Legislature to authorize, they ought not to be enjoined. The terms of the Act are so broad, it is clear that it includes the right to build a horse-car railway. It is a case of the major including the less. The question then recurs, is a horse-car railway along a public street or highway a new and additional servitude on the land? It is well established that a highway cannot be diverted by the authority of the Legislature, or those who enjoy the easement, to other purposes than those for which it was dedicated or acquired; nor can it be so enlarged as to cumulate burdens on the land not reasonably contemplated in the dedication or condemnation. The theory upon which the courts of Connecticut, New Jersey and Ohio, justify the use of public highways for laying horse-car railways, is that the dedicatory is presumed to have intended the highway to be used in such way by the public as would be most convenient and comfortable for travel, or doing any necessary work; and that any improved mode of using the road, for any of the contemplated objects and convenience, is not an invasion of the rights of the owner of the abutting land. It has been further held that to sustain a claim of intrusion on his rights such owner must show some injury other and different from that sustained by the public generally, for whose use the roadway has been dedicated. *City R. R. Co. v. C. R. R. Co.*, 20 N. J. 61; 17 N. J. Eq. 75; 14 Ohio, 523, and *Elliott v. R. R. Co.*, 32 Conn. 579.

Judge Cooley draws a distinction between streets taken or dedicated for city or town purposes, and country highways. He thinks that a street is to be regarded for all the ordinary purposes of a street, not only as such as have been hitherto adopted, but those "demanded by new improvements and new wants," and includes within "new improvements and new wants," which the original dedication must have contemplated, grooved tracks for carriages, and regards them as "almost as much a matter of course as paving and grading." Cooley's Constitutional Limitations, 556. This distinction, if supported by authority, upon which we do not pass, cannot and ought not to apply in this case; for, although the way is not technically within the city limits, its location, in such near proximity thereto, as an entering way into the city and exit there-

from; and in fact, as an extension of one of the city streets it must, and ought to be regarded as subject to the same burdens in the way of use which would legitimately fall on the street, of which it is, at the place in question, only an extension. It is so near the city proper, and used in such way by the city people and others, that when it was formally dedicated many years ago, it was then called Decker street, in consequence of the mode of occupation of the adjacent property, and the rapidly extending limits of quasi city occupancy. Under such circumstances, it must be supposed the dedicator intended it to be liable to all the uses of city streets, one of which, it was so absolutely certain, that in the growth of the town it would become. In *Peddicord's case*, 34 Md. 479, this Court, in passing upon the rights of the Catonsville Passenger R. R. under its contract with the turnpike company, say the use so granted does not (in the language of the Court in 14 Ohio, 523), "exclude or seriously interfere with the original modes in which the highway was used, but simply adds another in furtherance of the same general object." The effort to distinguish this case from *Peddicord's* is vain. It is true that in that case the R. R. Co. derived their powers by contract from the turnpike company, who had secured the easement, by legislative aid, through purchase or condemnation. Still it was only an easement, as a highway, for the ordinary and usual uses of a turnpike, which the turnpike company had obtained, and if the turnpike company had the right, under its charter, to authorize the Catonsville R. R. Co. to lay such a track along its line or road, and such use by the R. R. Co. did not add a new servitude upon the road, as against the adjacent proprietor, surely the public have acquired in Decker street or Maryland avenue a right of as high grade as the said turnpike company secured. If that be so, then the Legislature, representing the public, may grant this right of improved use of the highway. Whenever a case shall arise wherein the right is claimed under that statute to build another kind of road, it will be time enough to consider that as part of the question.

The only remaining question to be considered is the point made by appellants' counsel, that because, when the decree was passed and the injunction dissolved, the time within which the appellees were to complete their work had expired, it was error in the Court to dismiss the bill and dissolve the injunction; and that then the injunction should have been made perpetual. Their time, it is contended, expired on the 1st day of January, 1878. No supplemental bill has been filed suggesting that as an additional reason for the injunction, and no proceeding below by which the point appears to have been raised. On the contrary, the case went to a commission for testimony, and all testimony was taken after the period named, and the bill was dismissed, by consent, *pro forma*, for the purpose of appeal. Under such circumstances, therefore,

this Court on review, must consider all the proceedings as relating to the time of filing the bill, and decide the cause according to the actual rights of the parties appellees at the time they were arrested, at the instance of appellants, by injunction, from proceeding with a work, which we hereby hold was then legitimately authorized. If by reason of the delays incident to the litigation the appellees have lost their right to finish their work, it is their misfortune; but the appellants cannot maintain their appeal by reason of it. The injunction granted originally, on complainants' prayer, ought not to have been granted when it was granted, therefore the final order dissolving it was correct. In addition to the reasons already assigned, it may be well to add, that to hold otherwise on this point would, in effect, be declaring a forfeiture of appellee's charter, in an incidental way, without any proceedings instituted for the purpose. We think the decree of the Circuit Court dissolving the injunction and dismissing the bill was right.

Decree affirmed with costs.

McALLISTER

v.

CHICAGO, R. I. AND P. R. R. Co.

(*Advance Case, Missouri. October Term, 1881.*)

Certain cattle while in transportation were unloaded from the cars of the company, and were then illegally seized under a writ for an alleged violation of the statute of the state prohibiting the introduction of Texas, Mexican, or Indian cattle into the state, and subsequently were sold to satisfy the fine, the costs of the proceedings, and the forage and care of the cattle. *Held*, that the company was not liable for the loss of the cattle, upon the allegation of a wrongful unloading, the damages being too remote.

Where the legislature have enacted a law, which has not been judicially declared to be unconstitutional, a private person is not bound at his peril in damages to know that the law is unconstitutional and void.

ERROR to De Kalb Circuit Court.

The facts sufficiently appear in the opinion.

RAY, J., in delivering the opinion of the court, said: This is not a suit to recover damages arising from delay in the transportation or delivery of freight or from a depreciation in the weight or market value of said cattle by reason of anything done or omitted by the defendant. On the contrary, the plaintiff seeks to recover damages for an alleged wrongful unloading of his cattle from certain cars, contrary to his directions and wish; whereupon certain other parties, entire strangers to the defendant, and over whom it had no control, acting under the forms of the law, caused his arrest

and the seizure of his said cattle for an alleged violation of the statute of the state, prohibiting the introduction of Texas, Mexican, or Indian cattle into this state, except under certain limitations and restrictions therein contained. In this connection it is further charged that the plaintiff was thereupon summarily tried and convicted of said charge, and his fine assessed at the sum of \$100, which, with the costs of said proceedings and taking charge of and feeding said cattle, amounting to the sum of \$216.10, was adjudged against the plaintiff in said proceedings; that plaintiff was allowed no time to procure evidence that said cattle were not Texas, Mexican, or Indian cattle; and that the said cattle were all sold to satisfy said fine and costs, and then and thereby became, and were, a total loss to the plaintiff. From this statement it is manifest that his said damage is the direct and immediate result of said arrest and seizure by said third parties, for whose conduct and acts this defendant is in no way responsible. In such case it is clear that said alleged wrongful unloading was not the proximate cause of said loss or damage. It is not even alleged that except for the unloading the arrest and seizure could not and would not have taken place, nor are any sufficient facts stated, whereby it became, and was, the duty of the defendant not to unload them. In the absence of any such statement, defendant certainly had no right to anticipate or apprehend any such consequences as followed. It is clear, we think, from all the authorities, that such consequential damages are too remote, and cannot be held under the facts in this petition to have been within the contemplation of the parties to the agreement and shipment when the same was made. *Cutting v. R. R. Co.*, 13 Allen, 381-384; *Hadley v. Baxendale*, 9 Exch. 354; *Clemens v. R. R. Co.*, 53 Mo. 366; *R. R. Co. v. Ragsdale*, 46 Miss. 458.

We are told by the plaintiff in error that the statute under which he was arrested and fined has since been held unconstitutional. We do not see how this can help him. If the law was invalid it was not unlawful to unload the cattle in Cameron; besides that, he nowhere charges or admits that his cattle came within the purview of that statute. If they did not it is immaterial whether the same be valid or invalid. In no event is he liable to its penalties or the defendant a wrong-doer by reason of having unloaded them at the place charged, provided no unnecessary delay in their transportation was necessarily occasioned thereby. The fact that they were thereupon seized by third parties (over whom the defendant had no control) under the forms of the law, and were ultimately sold to satisfy the fine and costs adjudged in said proceedings, and were thereby lost to the plaintiff, does not render the defendant liable for the damage thus sustained. It is not sued for improperly surrendering the cattle to an officer under void process. And if it was, the writ, if not void on its face, would justify the officer and protect the defendant in surrendering the cattle thereunder. It is not

charged that the writ was invalid upon its face. The defendant was not bound to know that the law, under which the proceedings were had, was unconstitutional. The legislature had enacted it under all the forms of the Constitution; the judicial proceedings thereunder were regular on their face, and up to that time no court had ever declared the same unconstitutional and void. But in any event, whether the law be valid or invalid, the damages in question were the direct result of said legal proceedings instituted and carried out by third parties, who were entire strangers to the defendant, and for whose acts and doings, whether right or wrong, it is in no way responsible. In no event was the unloading of said cattle the proximate or necessary cause of said loss. The defendant was not bound to anticipate, or apprehend that such proceedings, whether right or wrong, would be instituted, and the damages so resulting are too remote to be chargeable on the defendant. There is, therefore, no error in the record, and the judgment is affirmed.

Judgment affirmed.

FREDERICK CHAFFEE

v.

THE RUTLAND R. R. CO. AND TRUSTEE.

(58 *Vermont Reports*, 345. *February Term*, 1881.)

An action based upon a written contract itself can only be brought against the party named in the instrument; hence, an action of assumpsit cannot be maintained against a railroad company, based upon a written contract, signed by, and in the name of, the trustees of the mortgage bondholders of such road.

There could not be a novation of parties in this case; because the trustees had bound themselves,—not binding the company,—and one of them was also president of the defendant company; and acting in this double capacity, he could not contract with himself; could not discharge himself and put the company in his place.

A Court of Chancery could charge upon the trust property the legitimate expenses incurred in managing it; but not even this upon the bondholders personally.

Distinction between the powers of an agent and trustee.

The plaintiff, being a stockholder in the defendant company, is charged with knowledge of the capacity in which the trustee was acting.

THIS case was tried at May Term, 1879, BARRETT, J., presiding. Trial by the Court, and judgment for the plaintiff. Action of assumpsit on a written contract; plea, non-assumpsit. Several questions were raised in the court below; but the facts bearing upon the case as decided by the Supreme Court sufficiently appear in the opinion, except the contract, which is as follows:

RUTLAND RAILROAD COMPANY.

I, Frederick Chaffee, of Rutland, propose to deliver on the line of the Rutland Railroad, at Ludlow Station, and near Ludlow Station, on the line of said Railroad, twelve thousand cords of mixed wood, at four dollars per cord, to be one half hard wood and one half soft wood, to deliver from one to two thousand cords per annum until the twelve thousand cords is delivered. . . . (Here follows a description of the wood, how to be cut, piled, etc., etc.)

Dated at Rutland this first day of Dec. A.D. 1870. F. CHAFFEE.
Rutland, Vt., Dec. 1st, 1870.

The foregoing proposal of F. Chaffee this day accepted. Payment to be made within thirty days after delivery, measurement, and inspection.

JOHN B. PAGE, } Trustees 2d M.
E. A. BURCHARD, } B. R. & B. R. R.

By I. J. Vail.

James C. Barrett, for the plaintiff.

As to the novation or substitution: The findings of the County Court upon the question of fact are conclusive. The exceptions show the following:

"Said company (the defendant) assumed to be the party of the second part, and the plaintiff understood it to be so, and upon that understanding went on under it as above set forth."

Two things are plain: First,—Upon the facts relied upon by the defendant, touching the point in question, no implication whatever arises as matter of law. Secondly,—Even if such implication of law would arise in the absence of a finding of the fact to the contrary, yet, such fact being found, the fact must prevail. *Conventio legem vincit*.

Actual delivery overcomes any presumption arising from any act of measuring, or the like, remaining to be done. *Benjamin on Sales*, s. 331, and note *h.*; and cases there cited; *Ib.* s. 346; *Ib.* 334, note *t.*, 13 Pick. 183; *Sumner v. Hamlet*, 12 Pick. 76; *Kelsca v. Haines*, 41 N. H. 254; *Reporter*, Feb. 11, 1880, 182; *Hanson v. Meyer*, 6 East, 614; *Benjamin on Sales*, 257, n. *f.*; *Ib.* s. 311, n. *c.*; *Ib.* Bk. II., Part II., C. III., IV., V.; *Gibbs v. Benjamin*, 45 Vt. 124; *Ward v. Shaw*, 7 Wend. 404; *Tyler v. Strong*, 21 Barb. 198, 206; *Fitch v. Burk*, 38 Vt. 683, 689.

Prout & Walker, for the defendant.

The written contract was not the contract of the defendant. Has there been in law a substitution either of parties or of liability? This can result only from agreement. There must be a mutual agreement between all the three parties, the creditor, his immediate debtor, and the intended new debtor, for the substitution of the new debt in the place and stead of the original debt. 1 *Addison on Cont.* 530, s. 373; *Wilsford v. Wood*, 1 Esp. 183; *Forth v.*

Stanton, 1 Saund. 211; Thomas v. Shillibeer, 1 M. & W. 124; Caxon v. Chadly, 3 B. & C. 591; Price v. Easton, 4 B. & Ad. 433; Cochrane v. Green, 9 C. B. (N. S.) 448; Shaffer v. Henkel, 75 N. Y. 375.

Besides, it is not found as a fact that the original debtors were ever released, or that the parties ever had any communication upon the subject. Anderson v. Davis, 9 Vt. 136; Watson v. Jacobs, 29 Vt. 169; Williams v. Little, 35 Vt. 323; Fullam v. Adams, 37 Vt. 391; Cole v. Shurtliff, 41 Vt. 311; Newall v. Ingraham, 15 Vt. 422.

Acceptance necessary to the passing of the title. Rider v. Kelly, 32 Vt. 268; Carpenter v. Brainard, 37 Vt. 147; Hodges v. Fox, 36 Vt. 81; Boardman v. Keeler, 21 Vt. 78; Gibbs v. Benjamin, 45 Vt. 124; Outwater v. Dodge, 6 Cowen, 85; Downer v. Thompson, 2 Hill, 137.

The opinion of the court was delivered by

Ross, J. The plaintiff seeks to recover on a contract in writing made and signed by him of the first part, and John B. Page and E. A. Burchard, trustees of the second mortgage bonds of the Rutland and Burlington Railroad Company, of the second part. To entitle himself to recover thereon he must show, either that the defendant was the principal and Page and Burchard its agents in making the contract, or, that the defendant had become the second party to the contract by novation.

I. The case was tried by the court; and from the facts found and stated in the exceptions, it appears that Page and Burchard, as trustees of the second mortgage bondholders of the Rutland and Burlington Railroad Company, took possession of the road, and operated it several years; that in the meantime a charter was obtained from the Legislature in the interest of the second mortgage bondholders, the mortgage foreclosed, and the defendant company organized thereunder, in July, 1867; that subsequently to the organization of the defendant company the trustees as such continued to operate and manage the road, "by permission or procurement" of the defendant, "and in its interest until upon the settlement of their accounts as trustees, said road, on the 8th day of February, 1871, went into the possession and management of the lessees," the trustees and managers of the Vt. Central and Vt. and Canada Railroads, by a lease dated Dec. 30, 1870; that John B. Page has been the president of the defendant company since its organization; and that the contract, on which recovery is sought to be had, was first verbally entered into about the time, and just after, the defendant company was organized, and was to continue in force by its terms from eight to fifteen years, but was reduced to writing and executed in its present form, Dec. 1, 1870. John B. Page, during this time, was acting in the double capacity of president of the defendant company, and as one of the trustees

of the second mortgage bondholders of the Rutland and Burlington Railroad Company, which the defendant company eventually displaced. E. A. Burchard, so far as appears from the exceptions, never acted, nor pretended to act, except in the single capacity of trustee of the second mortgage bondholders. The court have found that the plaintiff understood that the defendant was the real party in interest and to be bound by the contract, as the wood was for use in running the road of the defendant, and the performance of it was to extend through a term of years. It is not found that the defendant ever authorized the making of the contract, nor that Page and Burchard held any such relation to the defendant as authorized them to bind the defendant by the contract, unless their relation as trustees gave them such authority. As trustees of the second mortgage bondholders, they took possession of the property, and operated it in fulfilment of their trust duties, and not otherwise. By the mortgage, the title to the property, on default by the Rutland and Burlington Railroad Company, became vested in them in trust for the bondholders. Their powers and duties for the bondholders were those of a trust, and limited by the conditions of the mortgage. They gave them no power to bind the bondholders personally by their contract, nor the defendant though chartered and organized in the interest of such bondholders. Their legitimate expenses incurred in managing and operating the trust property the Court of Chancery could charge upon the property; but the trustees could not bind the bondholders personally for the payment of these even, and much less for the performance of contract which were to extend a term of years beyond the duration of the trust. By the contract, the trustees became personally liable for its performance. *Sprague v. Smith*, 29 Vt. 421; *Blumenthal et al. v. Brainard et al.*, 38 Vt. 402. An agent acting within the scope of his authority binds his principal, if disclosed, and not himself. The capacity in which Page and Burchard claimed to act in making the contract is declared upon the face of the contract. But if not disclosed, the doctrine that an agent, acting for, and without disclosing his principal, binds the latter by the contract does not apply to the relation of trustee and cestui que trust; because that relation is not one of agency. *Everett v. Drew*, (a recent Massachusetts case found in *The Reporter* of Sept. 29, 1884, p. 405.) It is immaterial to inquire whether Page, acting in the capacity of president of the defendant, could, without the approval of the directors, have bound the defendant to the performance of such a contract. He did not act, nor profess to act, in that capacity; but solely in his capacity as trustee in connection with his co-trustees, and from the contract, as executed, the plaintiff had no right to understand that they were attempting to, or did bind, the defendant to the performance of the contract. The court have found no act, nor omission to act, by the defendant

from which the plaintiff had the right to understand that Page and Burchard, as trustees, had the right to, or were, in fact, binding the defendant to the performance of the contract. The mere fact that the contract was written on paper, with the words, "Rutland Railroad Company" printed, or written, above the offer signed by the plaintiff, and the acceptance of the offer signed by Page and Burchard, trustees of 2d. M. B. R. and B. R. R. gave him no right so to understand. Nor did the fact that the wood was to be delivered on the line of the road of the defendant. Nowhere in the offer, or acceptance, is the defendant mentioned or alluded to as a party to the contract. It seems now to be the better-established doctrine in this country, although a contrary doctrine has prevailed to some extent in England, that when a contract is reduced to writing, and an action is brought upon the contract itself, no other persons can be made parties than those named in the instrument; but when a right of action exists independent of the writing, which is merely offered as evidence tending, among other things, to establish that right, then the party having the legal interest or liability, and for whom the contract was actually made, may sue, or be sued, although not named in the writing. It is well settled that on sealed instruments, bills of exchange or promissory notes, none but the parties named in the instrument by their name can be made parties to the action. 1 Pars. Con. 48 and notes, and cases there cited. The contract, in issue both in amount and time of performance, is required to be in writing, by the Statute of Frauds, and to be signed by the party to be charged, in order to enable the other to maintain an action thereon. Hence, if the signature of Page and Burchard thereto was in fact made for, and on behalf of the defendant, though not under seal nor a negotiable instrument, the plaintiff could not thereon maintain an action against the defendant, as his action is upon the contract itself. The delivery of the wood at the place named, and of the kind and quality named, without acceptance, would give him no right of action against the defendant. It is conceded by the plaintiff's counsel "that if the defendant is liable at all, it is liable as party of the second party to the contract." If the plaintiff had proved by parol testimony that the signature of Page and Burchard was in fact the signature of the defendant, without objection by the defendant to such testimony, and the court had found that fact on such testimony, it would have thereby waived the benefit of the Statute of Frauds. *Montgomery v. Edwards*, 46 Vt. 151; *Strong v. Dodds*, 47 Vt. 54. But no such fact is found, nor is it inferable from the facts found; and independently of the Statute of Frauds, on the principles governing actions upon written contracts above stated, the defendant could on the contract being produced insist that by its terms it was not liable thereon.

II. To constitute a novation of the contract as to the defendant,

the plaintiff, Page and Burchard, and defendant must have mutually agreed that Page and Burchard should be discharged as the party of the second part, and the defendant be substituted as such party, binding itself to the plaintiff and plaintiff to it, each to perform to the other all which the contract requires to be performed by such party, respectively. To entitle him to recover on this ground, the burden was upon the plaintiff to show such novation. It was not incumbent upon the defendant to introduce proof to establish this fact. The contract on its face was a defence on this ground. The trial in the County Court seems to have proceeded on the part of the defendant on the basis that the lessee of the road of the defendant, the Central Vermont R. R. Co., had become the party of the second part by novation. To this end, after the evidence was in, the counsel for the defendant claimed: "That there had been two novations of said contract; by one of which, the defendant company had become the party of the second part instead of Burchard and Page; and by the other the Central Vermont Company had become such party in place of defendant company. He made no point or claim that as between Burchard and Page and the defendant company, the former were the party liable under said contract, instead of the latter for the wood in question." This, as we understand, was his claim on the argument, and that such was the result of the evidence. It was not a concession on the trial, and while the evidence was being put in, that such was the fact, and that by reason thereof the plaintiff need not prove the existence of that part of his case. The other claims made by him were so worded as to show that he did not mean to be understood that he admitted the liability of the defendant. He was then resisting such liability, and claiming that the evidence, if it established a novation as to the defendant, also established a novation thereof as to the Central Vermont R. R. Co. It is evident that the court did not understand the counsel of the defendant as having admitted, or conceded the liability of the defendant, if the novation of the Central Vermont R. R. Co. was not established; because immediately following the sentence just quoted it proceeds to state the result of the evidence on this point as follows:

"The court find as matter of fact that in respect to the making of said written contract as aforesaid, and in what ensued under and in reference to it, between said Page, as president of said company, and the plaintiff, said company assumed to be the party of the second part, and the plaintiff understood it to be so, and upon that understanding went on under it as above set forth." In all the matters and conversations set forth between Page as the president of the defendant and the plaintiff not a word is said by, or to, Mr. Burchard; nor does Mr. Page, as president, profess to deal with and discharge himself, nor himself and Burchard as trustees, and substitute in their place the defendant company. The plaintiff was a holder of second mortgage bonds of the Rutland and Burlington

R. R. Co., and as the result thereof a stockholder in the defendant company, and thus charged with knowledge of the double capacity and duty in which Mr. Page was acting. It is well settled, upon soundest principles of public policy, that Mr. Page as trustee, having become personally bound to the fulfilment of the contract, could not as president of the defendant company contract with himself to discharge himself from his personal liability on the contract, and as agent of the defendant company substitute it as the second party to the contract in place of himself and Burchard. But to constitute a novation the defendant must have been substituted in the place of both Mr. Page and Mr. Burchard. The exceptions are entirely silent in regard to Mr. Burchard ever having become in any way, directly or indirectly, a party to the many talks and understandings between the plaintiff and Mr. Page as president of the defendant company. So far as appears he has never consented or been asked to be discharged, or understood he was discharged from the contract. It is quite clear that the verbal contract was with Page and Burchard as trustees. They wanted the wood to operate the road with, took it for the first three years, used and paid for it as such trustees. After that the plaintiff, though his contract was with them personally, assumed to treat the defendant as the party who was to fulfil the contract, and Mr. Page, as president of the defendant, acknowledged the assumption, and tried to cover in the contract under the lease, and compel the lessee to fulfil it, whether in relief of himself or for what purpose it is needless to inquire. This is apparent from what he did in collecting the money from year to year, or in obtaining the notes of the lessee in payment of the wood delivered. If some other person had made and executed the contract as the second party thereto, and the same had transpired between the plaintiff, such other person, and Mr. Page in his capacity of president of the defendant, which the court has found transpired between the plaintiff and Mr. Page in his double capacity of president and trustee, very likely a novation binding the defendant to the fulfilment of the contract as the party of the second part, might have been established. But the fact that Mr. Page was holding and acting in this double capacity, and this was known to the plaintiff, prevented his acts from discharging himself, or binding the defendant. Besides, Mr. Burchard never became a party to the claimed novation. Hence, on the facts found by the County Court no novation, by which the defendant became liable for the fulfilment of the contract as the party of the second part thereto, is established. This holding renders it immaterial, to consider, whether a novation by parol of a contract required to be in writing and signed by the party to be charged, to avoid the effect of the Statute of Frauds, does not reduce the entire contract to an unwritten contract, and so subject it to the infirmity cast upon such contracts by

the statute, of being incapable of enforcement by suit, and also whether the court adopted the true rule of damages. ‡

The judgment of the County Court is reversed, and judgment rendered on the facts found for the defendant to recover its costs.

LAKE SHORE AND MICHIGAN SOUTHERN R. R. Co.

v.

JOHN C. HUTCHINS, GUARDIAN, ETC.

(*Advance Case, Ohio. November 1, 1891.*)

A petition by a guardian alleged that his wards were owners in fee simple of a certain woodland, that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used and possessed for its own use and without any authority whatever by a certain railroad company, which company was afterwards consolidated with other railroad companies, under and by the name of the defendant, and that by reason of the conversion by said first named company his wards were greatly damaged, etc., praying judgment against the consolidated company, etc. *Held*: That on demurrer, the petition stated sufficient facts to constitute a cause of action for the conversion of personal property.

Where a discretionary power to sell lands is given by a will to the testator, such discretion cannot be delegated. But where an attorney in fact of such executor assumes to make such sale, the subsequent receipt of the purchase money, by the executor, is an adoption and ratification of the sale, and is equivalent to the exercise of the discretion by the executor himself.

A judgment determines the rights of the parties according to the facts stated in the pleadings; and if, after issue joined, a change takes place in the rights of the parties, it must be shown by supplemental pleading, otherwise it should be disregarded.

In an action for the conversion of chattels against an innocent purchaser from a person who had previously converted the property to his own use, and had afterward added to its value by his own labor, the measure of the damages is the value of the chattels when first taken from the owner, whether the first taker was a wilful or an involuntary trespasser. *L. S. & M. S. R. R. Co. v. Hutchins*, 82 Ohio St. 571, approved.

Error to the Court of Common Pleas of Cuyahoga County. Reserved by the District Court.

The petition in the original action was as follows :

THE STATE OF OHIO, <i>Cuyahoga County</i> , ss.	{	IN THE COURT OF
		COMMON PLEAS.
JOHN C. HUTCHINS, Guardian of JOSEPH R. and EDWARD	}	PETITION.
C. BARBOUR, minor children, Pl'ff.		
	vs.	
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY	}	
COMPANY, Def't.		

John C. Hutchins, the above named plaintiff, says that on the 9th day of September, 1869, he was duly appointed and qualified

as guardian of the estate of the said minor children, by the Probate Court of Cuyahoga County, Ohio, having due authority. That on the 24th day of May, 1862, said minor children were the owners in fee simple of the following described land: "Situate in the township of Mentor, County of Lake, and State of Ohio, and is known as being in the northeasterly part of the Ely tract, so called, in said Mentor township, and is bounded on the south, east and north by said tract lines, and on the west by the continuation of the main south tract line, north, till it strikes the north line of said Ely tract, at a point in said north line 23 chains and 81 links from the northeast quarter of said tract, the east and west lines of the land hereby conveyed being 13 chains and 34 links in length, containing (31) thirty-one acres of land."

Said land when owned by the said minors, was thickly wooded with excellent timber, and was very valuable on that account; that all, or nearly all of said timber, while said land was owned by said minors, was cut down and removed by persons now to this plaintiff unknown, without any authority whatever, and the same taken, used and possessed, for its own benefit, without any authority whatever, by the Cleveland, Painesville and Ashtabula Railroad Company, which was, on or about the 1st day of April, 1869, consolidated with certain other railroad companies, under the name and style of the Lake Shore and Michigan Southern Railway Company, which last named company is made the defendant in this action.

By reason of the said timber being taken from said land and converted to its own use by the said Cleveland, Painesville and Ashtabula Railroad Company, said minor children were damaged in the amount of four thousand six hundred and fifty dollars (\$4,650.00), for which sum, by reason of the premises, plaintiff asks judgment against the defendant, the Lake Shore and Michigan Southern Railway Company.

HUTCHINS & INGERSOLL,
Att'ys for Plaintiff.

To this petition a general demurrer was overruled.

Thereupon issue was joined by answer, as follows:

The said Lake Shore and Michigan Southern Railway Company, defendant, for answer says that for want of information it denies that the said minors, wards of the plaintiff, were, on the 24th day of May, A. D. 1862, the owners in fee simple of the land in the petition described. It denies the allegation in the petition that said land was then, or when alleged to have been owned by said minors, thickly wooded with excellent timber, and that the same was very valuable on that account. It denies the allegation that all, or nearly all of said timber, when said land was owned by said minors, was cut down and removed by any person or persons without authority. It denies that the same or any part thereof was either taken, used

or possessed by the said Cleveland, Painesville and Ashtabula Railroad Company, as is alleged against it. It denies that any damages have been suffered by said minors, and denies its liability to the plaintiff for any amount.

JAMES MASON,
Att'y for Def't.

On the trial a verdict and judgment were rendered for the plaintiff for \$1,820.00.

A motion for a new trial was overruled and a bill of exceptions taken, setting out all the testimony and divers exceptions to the introduction of testimony, refusing testimony and to charges given and charges refused.

A petition in error was filed in the district court, by the defendant below, also a cross-petition by the plaintiff below, which were reserved by the district court. A further statement of facts will be found in the opinion.

MCLLVAIN, J.

It is claimed by plaintiff in error that the overruling of the demurrer to the petition was error. That sufficient facts to constitute a cause of action were not stated.

Under the liberal rules of the code of civil procedure, which require a construction favorable to the pleader, the court is of opinion that the demurrer was not well taken. As against a demurrer, we think a cause of action for damages for the conversion of timber, after the same had been severed from the land and had become the personal property of the plaintiff, by the defendant to its own use, is sufficiently stated, whatever the rule would have been on a motion to make the petition definite and certain.

As to the ownership of the chattels alleged to have been converted by the defendant to its own use, the plaintiff relied on the title of his wards to the land before and at the time the timber was severed from the realty.

On the part of defendant, it is claimed that the plaintiff's wards had no title whatever to the land or the timber.

To maintain the issue on his part the plaintiff proved title to the land in one Justin Ely, and then offered the last will and testament of said Justin Ely, from which the following extracts only are material:

"All the residue and remainder of my estate, real and personal, wherever situate, I give, devise and bequeath to my son Charles and my daughter Lucy, to have, receive and enjoy the use, income and profit thereof in equal shares during their natural lives, respectively; and upon their decease I give, devise and bequeath the same to all my grandchildren then living, to be equally divided among them, and to their heirs forever; provided, however, that if the wife of my son Charles shall survive her husband, then she shall

have the use and income of his portion thereof during her life, and the devise to my grandchildren shall not take effect in respect to such portion until her decease.

"I hereby constitute and appoint my son Charles and my daughter Lucy executors of this my last will and testament; and it is my direction that they be not required to give bonds for the discharge of the duties of said trust, nor to return an inventory of my estate.

"And I do authorize my said executors to sell at their discretion any part of my real estate not herein specifically devised, and to change at their discretion any of the securities belonging to my estate."

The locus in quo was part of the residue so devised. Next was offered a power of attorney from said Charles and Lucy to one Heman Ely, purporting in ample form, to authorize said attorney to sell and convey any part or all of said lands, and upon such terms as he might deem best. Next a deed from Heman Ely as such attorney for the lands described in the petition to one Bowles; and then mesne conveyances from Bowles to the wards of the plaintiff. Testimony was also offered tending to show that the consideration received by said Heman Ely upon the sale to Bowles was paid to said Charles and Lucy Ely. And also that actual possession of the premises had passed with and by the several mesne conveyances.

Upon this state of the testimony, the court charged the jury, in effect, that if they found the facts in accordance with the tendency of the proof, then the ownership of the plaintiff was sufficient to sustain the action, although his wards were seized only of an equitable estate in the land.

We think there was no error in the charge to the prejudice of the defendant, and that the finding of the jury under it should not be disturbed. True, the power conferred upon the executors of Justin Ely to sell these lands (beyond the life estates) was to be exercised in the discretion of the executors, and clearly, the exercise of this discretion could not be delegated by them to another. If, however, the executors had exercised the discretion and had contracted to sell the lands, it would have been competent for them to have transferred the title to the purchaser by an attorney in fact. For in such case, the act of the attorney would be ministerial merely and not at all discretionary. In the case before us, the attorney having assumed to sell and convey, the subsequent receipt of the purchase money by the executors was such an adoption and ratification of the contract of sale as was equivalent to an exercise of the discretionary power of sale by the executors themselves, so that, after possession taken by the purchasers, their ownership in the lands was sufficiently established to maintain an action for the conversion of timber. And if the court below were wrong in holding that plaintiff's wards were seized of an equitable estate in the

lands, and not of the legal estate, the defendant was not prejudiced thereby.

During the progress of the trial, testimony was offered tending to show that during the pendency of the action, the plaintiff's wards had each arrived at the age of twenty-one years, whereupon the defendant asked leave to amend its answer so as to show such fact, but declined to amend on condition of the payment of costs. And after the testimony was closed, the defendant moved the court to dismiss the action or direct the jury to return a verdict for defendant on the following grounds:

"For cause defendant says that it appears from the testimony that the ward Joseph became of full age some time in 1870, and the ward Edward became of full age some time in the year 1877, for which reasons defendant says plaintiff is not entitled to the money if recovered. That it does not belong to him as guardian. That since 1877 he has not been the guardian of either or for either of said alleged wards."

We need not stop now to inquire what action the court should have taken if the facts here stated had been pleaded by supplemental answer before trial. It is enough to say that during the trial, leave to amend was at the discretion of the court, and no issue having been tendered upon this point, it was not error to refuse the motion to dismiss. The rights of the parties as they existed at the commencement of the action should prevail, unless a subsequent change in those rights be shown by supplemental pleadings.

Several other matters, also, are alleged for error, by the plaintiff in error, but we find in the record no cause for reversal of the judgment on its petition.

By the cross-petition in error, the defendant alleges for error the charge of the court as to the measure of damages. For the purpose of resolving this question, the case may be stated thus: The plaintiff was the owner of land upon which trees were standing and growing. By an act of wilful trespass, the plaintiff's trees were cut and felled. After the cutting down of trees, the trespassers converted the same into cord-wood and railroad ties and sold and delivered the wood and ties to the defendant, who, being ignorant of the trespass, applied the same to its own use. The value of the standing trees was proved; also the value of the ties and wood at the time the same were delivered to and received by the defendant. Testimony was offered by the plaintiff to show that the value of the trees after they were felled was greater than while standing, although less than when converted into ties and wood, which testimony was rejected.

This case was before the Supreme Court Commission and is reported in 32 Ohio St. 571, wherein it was held, "Timber was cut from lands of B. by trespassers, who, by their labor, converted it into cord-wood and railroad ties, thus increasing its value three fold.

It was then sold to an innocent purchaser who was sued by B. for the value of the wood and ties. Whatever might be the rule of damages" (as against the trespassers) "as against innocent purchasers, B. cannot recover the value of the timber as enhanced by the labors of the wrong-doers after it was severed from the realty," and a judgment for such enhanced value was reversed. The cause being remanded to the court below for a new trial, the court among other things charged the jury as follows:

"The Supreme Court have given us a different rule of damages from that laid down upon the former trial of the case in this court. There, upon the former two trials of this court the judges charged the jury that the plaintiffs would be entitled to recover the value of the wood or ties, as the case might be, as they were when delivered to the railroad company, and they actually received them. The Supreme Court say that that was not the proper rule.

"Now whether the Supreme Court was wrong or not I don't propose to question. And counsel don't claim that I ought to question it.

"There has been some little discrepancy in the opinion of the different counsel as to what the Supreme Court did say. But I have put the interpretation upon it that, as I believe, the Supreme Court did say, and as I give it to you, and you have not any more right to question whether I am wrong than I have to question whether the Supreme Court was wrong. Now that rule is simply this: That if the plaintiff is entitled to recover, they will be entitled to recover the value of the timber as it stood in the woods at the time it was cut down by these wrong-doers."

As we understand the rule laid down by the Commission, the value of the timber, as enhanced by the labor of cutting down, was the true measure of damages. And surely, as the labor of felling the trees was a trespass on the real estate of the plaintiff who has waived the wrong done to his realty, such labor was not an accession to the value of his personal property, which the trees first became after they were cut down and severed from the land. The value, at least, of the property after it became personal was the measure of the injury complained of by the plaintiff. This charge of the court, as well as the refusal to hear testimony as to the value of the trees after they were severed from the realty, was to the prejudice of the plaintiff.

But the plaintiff below is not content with this view. He claims that the court erred in refusing to give as the measure of damages, the value of the ties and wood, at the time and place they were delivered to the defendant; thus, bringing into review, the decision of the Commission as reported in 32 Ohio St. 571. A decision of the Commission, which was a court of last resort in this State, equal in authority and dignity with this court, stands as a precedent for our decisions, and should not be overruled except for

most cogent reasons. The question then before the Commission, and now before us, is one of great importance and no little difficulty. Many cases were reviewed by the Commission, as will appear from the report, and after consulting those authorities and some others, it is apparent to us that reported cases are at variance at almost every point in the line of reasoning. It is true, that some principles involved are not disputed, and from these and some others that are indisputable, we think, the true solution of the question can be obtained. We admit as a general rule, that no man can be deprived of his property without his consent, except by operation of law. Hence, where his property has been taken from him, not by operation of law, and without his consent, he may follow and reclaim it, in specie, into whose hands soever it may come, so long as he can establish its identity. And in all cases where the owner seeks to reclaim the possession of his property, being able to establish its identity, the fact that accessions to its value have been made by the labor of those who have wrongfully withheld it, cannot be interposed against the right of the owner to the possession of his property. And in all such cases, it does not matter whether the person from whom it is reclaimed, or the person who enhanced its value by his labor, is a wilful trespasser or a person who came into possession without intentional wrong. A question often arises, whether property, by reason of changes wrought upon it, has lost its identity, but no such question is made in this case, as the plaintiff, if he had so elected his remedy, most clearly could have reclaimed the cord-wood and railroad ties from the original trespasser, or from the defendant who purchased them. But no such remedy was sought by the plaintiff.

Another undoubted doctrine of the law is, that a person whose property is wrongfully taken or withheld from him, may waive his right to the property in specie, and elect to pursue a remedy for damages only; and in such case, the general rule for the measure of damages is the value of the property at the time it was taken or converted by the wrong-doer. The principle upon which this rule of damages is based is, that justice requires that the injured party should be made whole; but justice to him requires nothing more. This rule is sometimes modified for the sake of the principle, as when the value of the property is subsequently enhanced by an advance in the market price; but the principle, as a matter of legal right, is never departed from. True, the law permits an award of damages in excess of this rule of compensation, when the wrongful act was wanton or otherwise aggravated. But this is permitted by way of punishing the wrong-doer and for example's sake. It is not a matter of legal right in the injured party.

For every wrong done, if it can be redressed in damages, the rule is that the injured party shall have compensatory damages, and if the wrongful act was wilful, wanton or malicious, punitive dam-

ages may also be awarded. Indeed it appears to me to be axiomatic, that as between man and man where no wrong was intended, equal and exact justice is done when the party wronged is made whole for all that he lost by reason of being deprived of property. Upon this principle it is now established by clear weight of authority, that a person deprived of his property by an unintentionally wrongful act, who seeks redress in damages, is not entitled to recover from the wrong-doer, an increase of damages by reason of accessions to the value of the property from the labor or skill of such wrong-doer. 3 N. Y. 379; 33 Mich. 205; 37 Mich. 332; 84 Penn. St. 333; 21 Barb. 92; 81 Ill. 359; 49 Miss. 236; 39 Wis. 456; 7 Up. Can. Q. B. 338; 15 Grant (Up. Can. Chy.) 304; 18 Grant (U. O. Chy.) 7; 13 Com. B. 729; 41 Pa. St. 291; 55 Pa. St. 176; 23 Cal. 306; 26 Maine, 306; 3 Ad. & El. (N. S.) 440.

Such being the rule, in an action against one who takes the property of another and converts it to his own use without intentional wrong, it certainly follows: that in an action against an innocent purchaser from such unintentional wrong-doer, the measure of damages would not include the enhanced value of the property by reason of the labor of the first taker. It seems clear, that such purchaser, having been mulcted in damages at the suit of the owner, could not have recourse against his vendor for greater damages, than the owner of the property could have claimed against him.

It only remains therefore, in this line of reasoning, to inquire as to the measure of damages in an action by the owner against an innocent purchaser of the property enhanced by the labor of a wilful trespasser. In such case it is clear that the defendant is not a proper subject of punishment; and it is equally clear that the plaintiff's loss is no greater than it would have been, if the trespasser had been innocent of all intentional wrong; nor is the guilt of the defendant greater. Hence, it seems to a majority of the court, that exact justice would be done as between these parties by limiting the plaintiff's damages to the amount of his actual loss, to wit: the value of the trees when they were first taken as personal property.

It is said, however, that the property was the plaintiff's at the time the defendant received it in its enhanced condition and converted it. This claim is technically correct. But whereby did he become entitled to the enhanced value of the property? His merit is that of reaping where he did not sow. The party whose labor enhanced the value is the meritorious owner of the increase. True, being a wilful wrong-doer, his interest in the property was subject to forfeiture at the will of the owner by way of punishment and for example sake; but the owner has not demanded the forfeiture from the wrong-doer. The demand is made upon an innocent purchaser. There is no suggestion that the purchaser did not exercise ordinary care in making the purchase. If after the purchase the

plaintiff had notified the purchaser of his title, and had demanded the possession of the property, we are not prepared to say that a refusal to deliver would not have shown such a wilful conversion of the plaintiff's property as would have entitled him to recover the enhanced value as the true measure of his loss. But that is not the case before us. The plaintiff did not desire to reclaim the property from the defendant. By bringing his action for damages, he voluntarily abandoned his right to the property; and having brought his action against the innocent purchaser, instead of the wilful trespasser, we think his damages should be limited to the value of the property when it was taken from his possession.

The suggestion that the rule of damages here adopted will induce purchasers of property to be careless as to the title of their vendors, is of little weight. Actual knowledge or wilful ignorance of the owner's rights on the part of the purchaser, would, no doubt, make him liable for the full value at the time of purchase. And, on the other hand, it might be suggested with, at least, equal force, that another rule might make owners negligent in pursuing remedies, until the property, greatly enhanced in value by the labors of others, would come into the hands of innocent, but more responsible persons than the wilful wrong-doer. We see no good reason for overruling the decision of the Supreme Court Commission.

The defendant in error having waived the error of the court below in limiting the damages to the value of the standing trees, the judgment below is affirmed.

BOYNTON, C. J., dissented from the ruling respecting the measure of damages.

While I concur in the reversal of the judgment upon the ground stated in the opinion, I dissent from the rule of damages laid down by the court as applicable to a case of this character. Upon a thorough search of the decided cases bearing on the subject, I have been unable to find one that supports the conclusion reached by a majority of the court, except the case between the same parties, and relating to the same conversion, decided by the Commission and reported in 32 Ohio St. 571. An examination of the authorities reviewed in that case, and others, has led me to the conclusion that that case was incorrectly decided. The facts conceded are, that wilful trespassers felled standing timber or trees growing on land of the defendant's wards, cut the same into railroad ties and wood, and sold the same to the railroad company, by which the wood was consumed, and the ties placed in the bed of its road before the defendant had knowledge of the fact. That the original trespassers could have obtained no abatement from the value of the wood and ties by reason of the labor bestowed in their production, had an action for their conversion been brought against them, is the settled doctrine of all the authorities. So long as the property can be identified the orig-

inal owner may recover it, in specie by an action of replevin, or recover its value in its improved state in an action for its conversion.

In *Snyder v. Vaux*, 2 Rawle, 423, trees were cut and converted into rails and posts; in *Smith v. Gouder*, 22 Ga. 353, into railroad ties; in *Heard v. James*, 49 Miss. 236, into staves; in *Halleck v. Mixer*, 16 Cal. 574, *Moody v. Whitney*, 34 Me. 563, and *Brewer v. Fleming*, 51 Penn. St. 102, into firewood; in *Betts v. Lee*, 5 John, 348 and 9 do. 362 into shingles; in *Brown v. Sax*, 7 Cow. 95, sawlogs into boards; in *Eastman v. Harris*, 4 La. An. 193, a raft of logs into firewood; in *Riddle v. Driver*, 12 Ala. 590, and in *Curtis v. Groat*, 6 John, 169, wood into coal; in *Hide v. Cook*, 26 Barb. 592, hides were manufactured into leather; and in *Silsbury v. McCoon*, 3 Comb. 379, corn into whiskey. There are numerous other cases of similar character, and in all of them it is held, that the title of the original owner is not affected by reason of the fact that the value of the property has been enhanced by the skill or labor of the wrong-doer voluntarily bestowed upon it. The same principle is applied to the case of one who voluntarily erects a building on the land of another without his consent. In such case the building becomes a part of the freehold, with no right in the person erecting it to remove it, or to compensation for his labor or material. 1 *Hilliard on Real Prop.* 5; *Bonney v. Foss*, 62 Me. 248; *Linahan v. Barr*, 41 Conn. 471; *Mathers v. Dobshuetz*, 76 Ill. 438. It is also held, where a party having charge of the property of another, so confounds and confuses it with his own, that the distinction cannot be traced, and the other's property identified, that the party so mixing and confusing the property loses his own.

The *Idaho*, 93 U. S. 575, *Hart v. Ten Eyck*, 2 John. ch. 62, 108, *Jewett v. Dringer*, 30 N. J. Eq. 291, 2 *Kent's Com.* 364, *Story on Agency*, §§ 205, 333, and cases there cited. The principle underlying all these cases, is, that no man shall be deprived of his property without his consent, except upon due process of law. The particular ground upon which the judgment of the court proceeds in the present case is, that because the railroad company was an innocent purchaser of the wood and ties from the original trespassers, a different rule is to be applied in measuring the damages the owner of the wood is to receive, from that that would prevail had the action been brought against the trespassers themselves. To this position I do not assent. The plain logic of the proposition is that the purchaser acquired by his purchase something which his vendors did not own, and consequently had not the ability to impart.

It is admitted that at the moment before the sale the whole property in the wood and ties was in the original owner, but the instant the sale was consummated, it is said, that some part of that property, without his consent, and in a transaction to which he

was not a party, has passed to the purchaser; and passed from one who, admittedly, had no title to or lien upon any part of it. And yet it is agreed that the original owner, by reason of his continued ownership, may, in an action of replevin take the property from the purchaser, without accounting to him for any part of its value. The purchaser's rights are thus not only made to depend on the form of the action, but if the action be brought for conversion of the property, instead of giving damages against the purchaser for his conversion, to be measured by the value of the property when he converted it, which, of course, was long after the timber was cut into wood and ties, he is made liable as of the date that the trees were cut from the soil, a point of time long anterior to the date of purchase. How this rule would work or how the liability of the purchaser would be affected, if the wood and ties when purchased were of less value than the timber when severed from the soil, we are not advised. But if anything is settled by the decided cases, it is, that where one wrongfully in possession of the property of another, refuses to deliver it to the owner on demand, he is liable in conversion to the full value of the property at the time of the refusal, not that demand and refusal are necessary prerequisites to the action, but when they appear, they, as a general rule, settle the fact and time of conversion. *Gilman v. Newton*, 9 Allen, 171. The conversion, however, is just as complete, and the time at which the liability therefor is incurred is as definitely fixed and ascertained, when the property is consumed or destroyed, or has been converted into realty, as in the case of demand and refusal. The unauthorized act of another in assuming dominion and control over the property by which the rightful owner is deprived thereof, is conversion. *Pease v. Smith*, 61 N. Y. 477. Hence when the wood and ties in the present case, were used by the company, they were as liable for their conversion as if demand and refusal had been made while it was in the company's power to deliver the same to the owner, and liable for the amount recoverable had demand and refusal been made upon the day the company purchased the property from the original takers. And if demand and refusal had then been made, and the company had refused to deliver the property to the owner, I know of no rule of law, that would relieve it from liability to damages for the full value of the property at the time of refusal. If such is not the rule, what results? When the purchaser is required to pay the real owner for the property, he may recover back the price paid to the wrongdoer, as upon a failure of consideration. This principle is well settled. *Eichholtz v. Banister*, 17 C. B. (N. S.) 708; *Chapman v. Speller*, 14 Q. B. 621; *Benj. on Sales*, § 423. The company would therefore get the wood and ties by paying the original owner the value of the timber when felled to the ground. Either

this results or the absurdity follows, that while the original trespasser had neither title to, nor lien upon, the wood or ties, he is enabled in an action for the price paid by the purchaser, to recoup the amount which his labor added to the value of the property. He would thus gain and accomplish by the sale, what otherwise, he could not have obtained. The principle that the purchaser in such case, however innocent, sustains no better relation to the property than did the party from whom he purchased it, is well supported by authority.

In *Silsbury v. McCoon*, supra, it was said by Ruggles, J., that "the thief who steals a chattel or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or trespasser is a continuing trespass; and if during its continuance the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars or into a tool, the manufactured article still belongs to the owner of the original material, and he may re-take it, or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original may still re-take it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may re-take the thing by an action of replevin, in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages." This doctrine was adhered to in *Joslin v. Cowee*, 60 Barb. 48, where it was said, "It is only innocent purchasers who purchase property converted into another species, that can be protected, and not even the innocent purchaser is so protected who takes the title from a trespasser or wrong-doer, because he had none to give."

The case of *Tuttle v. White*, recently decided by the supreme court of Michigan, and reported in the 9th volume of *The Northwestern Reporter* 528, is quite in point. The action was in trover for the conversion of certain saw-logs. The defendants purchased the logs in good faith, from parties who wrongfully cut them upon the land of the plaintiff. The court in disposing of the case, said: "A person in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser, or one who has no title and can give none, he must suffer the loss or look to his vendor." The plaintiff was held entitled to the value of the logs at the time the defendant purchased and assumed control over them.

To same effect is *Nesbit v. The St. Paul Lumber Co.*, 21 Minn. 491.

These cases are in accord with the large and uniform current of authority which holds that in purchasing personal property the purchaser must abide by the title of his vendor, and can acquire no better rights than he possessed.

WHITE, J., concurred in the dissenting opinion.

CLAFLIN and others,

v.

THE SOUTH CAROLINA R. R. Co. and others.

(*Circuit Court, D. South Carolina.*)

An issue of bonds secured by a first mortgage and issued for the purpose of taking up others of a prior issue, was larger than necessary for that purpose. In a suit brought by holders of a second mortgage to foreclose their mortgage, held, that such surplus bonds, whether actually out and in the hands of bona-fide holders when the second mortgage went into effect, or issued afterwards for the first time, as collateral, to secure a debt contracted at the time they were thus pledged—in either case, they were secured by such first mortgage equally with those applied to the purpose of the issue, even though, in the second case, such pledgee had full knowledge of all the facts.

Construing the language of the instrument with reference to the surrounding circumstances and the subject-matter of the contract, held, first mortgage bonds remaining unissued in the hands of the company, and those which afterwards came into their hands by purchase, without the intention of retiring them, could be issued, sold, and transferred by the company, after the date of the second mortgage, so as to carry a lien under the first mortgage.

A second mortgage, made to secure the payment of an issue of 6,000 bonds, of \$500 each, recited that the proceeds thereof were "to be applied exclusively to the extinguishment of the floating debt and the retirement of unsecured bonds." The manner of effecting this extinguishment was not provided for, further than by authorizing the president of the company to sell the bonds at not less than 80 per cent. which might be for one third cash and two thirds in unsecured bonds, at not less than 80 per cent. *Held*:

(1) In a controversy between bondholders, that bonds of this issue, even if pledged as collateral upon an extension or renewal of the floating debt, or to secure notes given in payment of unsecured bonds, were regularly issued and properly applied.

(2) Directors acting in good faith for the best interests of the company are entitled to the same rights as other creditors.

(3) Outstanding unsecured bondholders are not entitled to participate in the security of the second mortgage without first complying with the terms dictated by the company.

(4) Bonds purchased by the company with the proceeds of second mortgage bonds should be delivered up and cancelled.

(5) An attachment regularly issued in the state of Georgia is superior to the lien of a mortgage defectively recorded.

In Equity.

Mitchell & Smith, (of Charleston,) Chamberlain, Carter & Hornblower, and William Stone, (of New York,) for complainants.

James Connor, A. G. Magrath, Lord & Inglesby, De Saussure & Son, Simonton & Barber, H. E. Young, B. H. Rutledge, Rutledge & Young, W. D. Porter, G. R. Walker, Hayne & Ficken, A. T. Smythe, Buist & Buist, T. M. Hanckel, J. N. Nathans, M. P. O'Connor, W. A. Pringle, Joseph W. Barnwell, Charles S. Campbell, Thomas M. Mordecai, Simons & Simons, Edward Magrath, Bryan & Bryan, C. R. Miles, L. C. Northrop, and McCrady & Sons, for respondents.

WAITE, C. J.—This is a suit in equity by holders of bonds of the South Carolina R. R. Co., secured by what is known as the second mortgage, to foreclose that mortgage, subject to the lien of prior encumbrances. It naturally divides itself into six parts, which, for convenience, will be considered separately. They are: (1) The first mortgage; (2) the second mortgage; (3) the syndicate; (4) the sales of parts of the mortgaged property; (5) the attachments in Georgia; (6) the wharf property.

1. As to the first mortgage:

The original name of the South Carolina R. R. Co. was the Louisville, Cincinnati & Charleston R. R. Co. In that name, and under the authority of an act of the general assembly of South Carolina, passed December 12, 1837, the company issued bonds, payable part in London and part in Charleston, to the amount of £450,000, which fell due January 1, 1866. The payment of these bonds, principal and interest, was guaranteed by the state, and secured by statutory mortgage to the state on all the property and funds of the company in South Carolina. The name of the company was changed in 1843, and thereafter it was known as the South Carolina R. R. Co. In 1865 it became apparent that these bonds could not be met at maturity. Accordingly the general assembly of the state, on the twenty-first of December, 1865, passed another act, petitioned for by the company, authorizing the issue of other sterling bonds for the principal and interest of the first, and to be substituted for them. As the substitution was made the new bonds were to be guaranteed by the state, and this guarantee was to have the effect of continuing the original statutory mortgage in force the same as if no change had been made. Some exchanges were effected under this authority, but, on the whole, the scheme was a failure. In addition to the bonds thus put out, the company was in debt for other bonds, issued in 1849, amounting in all to \$175,000, which were to fall due, some on the first of January and some on the first of October, 1868. Under these circumstances, after negotiation with the bondholders, it was—

“Deemed advisable, for the better securing of the said debts,

that all the said bonds should be delivered up and cancelled, and new bonds issued in substitution thereof; the payment of said bonds to be secured by a mortgage to trustees of the estate, real and personal, of the . . . company, including therein all the real and personal property . . . situate within the limits of the state of Georgia, and not included in the statutory mortgage created by the act of 1867."

Thereupon the company—

"Resolved to execute its bonds, payable in London for an amount not exceeding in the aggregate the sum of £543,500, . . . to be dated on the first day of January, A. D. 1868, and to be payable to bearer, with interest thereon, at the rate of 5 per cent. per annum, payable semi-annually, . . . on the presentation of the proper coupons at the office of Messrs. Dent, Palmer & Co., in the city of London, . . . which said bonds shall be substituted for the sterling bonds now outstanding and payable in London."

The company also—

"Resolved to execute certain other bonds, not exceeding in the aggregate the sum of £76,500, . . . to be dated on the first day of January, A. D. 1868, and to be payable to bearer with interest at the rate of 5 per cent. per annum, payable semi-annually, . . . on the presentation of the proper coupons at the office of the . . . company, in the city of Charleston . . . which said bonds shall be substituted for the sterling bonds . . . payable in Charleston."

It was also—

"Resolved to substitute for the bonds issued in the year 1849, and payable in currency of the United States, . . . or to apply to the satisfaction of said bonds, upon such terms as may be agreed upon, the sterling bonds to be issued as heretofore provided for, so as to retire all the said bonds now payable in currency of the United States."

"To secure the true and punctual payment of the said bonds, . . . the company . . . resolved to pledge and mortgage to the [trustees named] all the real estate, wherever situate, which is now owned or may hereafter be acquired by the said company, and all the rolling stock and other personal property used, or necessary, in the operating of said railway."

In accordance with this scheme, bonds, with a mortgage to secure them, to the full amount of £620,000, were executed by the company, and certified by the mortgage trustees. Provision was made in the mortgage for a substitution of bonds "payable in lawful money of the United States, with interest not exceeding 7 per cent. per annum," for the new sterling bonds provided for, "upon terms to be agreed upon by and between said company and the bondholders desiring such substitution;" but the pound sterling on all payments of sterling bonds, or the interest thereon made

in Charleston, was "to be estimated at four dollars and forty-four and four-ninths cents."

All the old issues of bonds have been taken up by exchange or otherwise, and cancelled, except—

(1) Guaranteed Louisville, Cincinnati & Charlestown sterling bonds..	£16,050
(2) Guaranteed South Carolina sterling bonds	£8,000
(3) Bonds of 1849, Nos. 191, 192, 193.....	\$1,500
(4) Guaranteed South Carolina sterling bonds, pledged to E. L. Trenholm in 1870.....	£5,400
(5) One other bond of same character (No. 463)	£600
Against this the receiver now holds bonds originally put into the hands of the London agents for exchange, and which have not been used for that purpose.....	£34,450
Currency bonds in the possession of and owned by the company when this suit was begun.....	\$2,000

It is conceded that there are now outstanding in the hands of bona fide holders, and entitled to the benefit of the mortgage security—

New sterling bonds.....	£309,550
New currency bonds.....	\$1,114,000

The same is true of items 1, 2, and 3 in the statement above, showing the unretired bonds of the old issues.

It is also conceded that £620,000 was more than the old debt. If all the old bonds had been out when the new were issued, their aggregate, principle and interest, would not have reached this sum. They were not, however, all out. Some had been taken up by the company before that time; and it is apparent, from the evidence, that an issue of the whole amount of £620,000 would leave a surplus of \$400,000 and more, after fully providing for what were left outstanding. All the bonds of the new issue are now outstanding except such as are held by the receiver. No questions are raised as to any save the following:

(1) Amount pledged to several creditors of the company as security for moneys loaned, outstanding in the hands of the pledgees, October 1, 1872, when the second mortgage was made.....	\$114,000
(2) Amount pledged to C. H. Manson as security, January 19, 1877....	\$20,000
(3) Amount pledged to B. F. Moise, agent, January 15, 1874.....	\$4,500
(4) Amount of sterling bonds pledged to George W. Williams as security, May 14, 1874.....	£18,000
(5) Amount of loose coupons cut from bonds pledged to George W. Williams, and past due when the bonds were sold under the pledge.....	\$3,675
(6) Nine guaranteed South Carolina Railroad bonds, of £600 each, issued under the act of 1865, and pledged to E. L. Trenholm as security for money loaned, April 2, 1870.....	£5,400
(7) One bond of same character, being No. 463, pledged to the syndicate.....	£600

The date of the second mortgage is October 1, 1872.

Upon this state of facts several questions are raised which will now be considered. And, first, it is insisted that the company

could not issue under this mortgage any bonds not actually used in taking up or retiring the old ones. The argument is, that the mortgage is in legal effect a contract between the company and the bondholders, by which it was agreed that no bonds were to have the benefit of the security thus created, except such as were substantially "substituted" for the earlier issues. I am unable to discover any such contract. The mortgage purports to be made to secure bonds of certain descriptions, not exceeding in the aggregate £620,000. It recites other bond indebtedness secured by prior liens, and that the new bonds were to be substituted for the old. This may, and I think does, confine the lien of the new mortgage to an amount which, added to the prior specified encumbrances, shall not exceed the limit fixed, but that is all. Every bondholder can insist that the entire issue shall not exceed this sum, and every subsequent encumbrancer that the lien of the bondholders shall be correspondingly restricted. That this was the understanding of the company no one can doubt. As early as January, 1871, the treasurer, in a report to the stockholders, took occasion to refer to the surplus of these bonds, which he estimated at \$450,000, and to say that if they could be disposed of at their value the finances of the company would be greatly relieved. At this time one, at least, of the trustees named in the mortgage was a director in the company, and soon afterwards the issue of the surplus bonds, as collateral or otherwise, was commenced without objection from any one. As between the railroad company and bona fide holders of bonds certified in due form by the trustees, and purporting to be issued under the mortgage, there can be no doubt as to the lien. The company is estopped from denying that the bonds it has actually put out are what they purport to be. None of the first mortgage bondholders complain. So far as appears they are satisfied with the security they have got. The second mortgage covered only the equity of redemption which the company then had in the mortgaged property. Whatever bound the company then as to the extent of the mortgage lien within its limit of £620,000, bound the second mortgage bondholders. It follows that to the extent the bonds were actually out, and in the hands of bona fide holders, when the second mortgage was executed, there can be no question as to their priority.

It is next claimed that the first mortgage bonds which are held in pledge as security for the notes of the company have no priority over the second mortgage. So far as this objection relates to the bonds held by the defendants Middleton, De Saussure, Andrew Simonds, Rose, and Drayton, pledged and in the hands of the present holders before October 1, 1872, it is disposed of by what has already been said. They were all actually issued under the mortgage and accepted as such. This the company will not be permitted to deny; neither can the second mortgagees. No one has ever sup-

posed that a taker of negotiable paper, as collateral security for a debt contracted at the time, was not a holder for value. It follows that to the extent necessary to secure the debts due these defendants respectively, the lien of the bonds they severally hold is good. The same is true, also, I think, of the bonds held by the defendant Manson. The master has reported that these bonds were pledged after the second mortgage went into effect, and to secure a debt contracted at the time of the pledge. To this part of the report an exception has been filed. In my view this question is unimportant; but having looked into the evidence I am satisfied the exception is well taken. The bonds were out on pledge when the second mortgage was made, and the evidence leaves no doubt in my mind that the present debt in the hands of this defendant is, in legal effect, a continuation of the old one with the original pledge transferred. This exception to the report will therefore be sustained, and the pledge classed among those outstanding October 1, 1872.

As to the bonds for £18,000, pledged to the defendant George W. Williams, it is conceded they were not and never had been out of the control of the company when the second mortgage was made. They were executed and certified in proper form as bonds secured by the mortgage, and on the ninth of July, 1868, sent with others to the company's agents in London to be exchanged for old sterling bonds payable there. During the year 1874, when it was found they would not be needed to take up the old bonds, the company gave them in pledge to Williams, by whom they are now held, his note having been renewed from time to time until the commencement of this suit.

Soon after the report of the treasurer, in 1871, which has already been alluded to, the use of the surplus bonds as collateral was begun, and it is safe to say that, between that time and the date of the second mortgage, all except those in the hands of the London agents had been put out in that way. None had ever been actually cancelled, but all were kept on hand to be used as wanted. The second mortgage trustees might have required all on hand when the second mortgage was made to be retired, and the lien of the first mortgage confined to those already out. This, however, they did not see fit to do, and consequently the rights of those they represent depend on the effect to be given the instrument they took; and in this, as it seems to me, the intention of the company to keep the first mortgage on foot as a standing and continuing security, to the full extent of the originally-authorized issue, is clearly manifested. The language is "that the mortgage herein above granted shall be and continue at all times subject to the lien of the mortgage executed by the South Carolina R. R. Co. to Henry Gourdin, H. P. Walker, and James M. Calder, and to all renewals or extensions of said mortgage, or of the bonds secured thereby, to the full amount of the principal of said bonds." This, I think, means not only the

principal of bonds then out, but of all that might thereafter lawfully be put out under the mortgage, as well. The use which the company had been making, and which it was no doubt expected would be continued, of the surplus bonds remaining after providing for the old issues, must have been in the minds of all. One of the trustees under the second mortgage was at the time director of the company, and the idea of actually cancelling any of the old lien in favor of the new, seems never to have been suggested by any one.

The question is thus distinctly presented whether bonds then in the hands of the company, or which afterwards got there, could be issued or re-issued so as to carry with them a lien under the first mortgage as against the second. This, as it seems to me, is a question of intention to be gathered from the language of the instrument, considered with reference to the surrounding circumstances and the subject-matter of the contract. I am aware that, ordinarily, a debt once paid is extinguished, and that as a mortgage is but an incident of the debt it secures, if there is no debt there can be no mortgage. But here the point of the inquiry is whether the parties intended to apply this rule in all its strictness to the prior mortgage, about which they were contracting. Certain it is that, before the mortgage can be cancelled, the debt it purports to secure must be shown never to have been created, or, if created, extinguished within the meaning of the contract for security expressed in the mortgage. As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds become due. The contract with the individual bondholder is no more than that he shall have his due proportion of the security the mortgage on its face implies.

Railroad bonds are a kind of public funds. They are put on the market and dealt in as such. They are treated as current until past due or actually retired. The mortgages provide for the security of the particular bonds they describe, and the company puts the bonds out from time to time as occasion requires. When a dealer finds such bonds not yet due in the hands of the company, with the proper certificate of the mortgage trustee upon them, it has, I think, always been understood in the commercial world that he might buy in good faith with safety. The security has been considered a continuing one, and the bonds negotiable by the company so as to carry the mortgage security until they have become commercially dishonored, or something else has been done to deprive the company of its power of putting them out. In my opinion a subsequent mortgage is not sufficient for this purpose, unless it in terms limits the lien of the prior mortgage to bonds actually out, and provides against re-issues. As it would be within the power of the second mortgage to require that all bonds not out should be destroyed, so as to prevent their getting on the market, it may be doubtful whether, as against a bona

fide holder, the limitation contained in the second mortgage would be of any avail, unless the bonds themselves had been actually cancelled, or carry on their face the evidence of an extinguishment of their lien. It is so easy for one taking a subsequent lien to protect both himself and the public against loss in this particular, that, if he fails to do so, he should be treated as guilty of a commercial wrong, and made to suffer accordingly.

Take this case as an illustration. The first mortgage provides for an issue of £620,000. In point of fact the full amount was executed, properly certified, and left with the company to be put out as wanted. According to the construction I have already given the mortgage, the most one purchasing from the company need do before the making of the second mortgage was to inquire whether there was a surplus to be sold after taking up the bonds for which this issue was to be substituted. The second mortgagees voluntarily permitted the first mortgage to stand as it was. In this the second mortgage bondholders are represented and bound by their trustees. Whatever the company could do with the first bonds before, it might do after, so far as any express limitations in the second mortgage were concerned. The lien of the first to its full amount was recognized, and nothing was said or done showing directly any intention to limit the power of the company under it. Suppose, instead of a mortgage to secure bonds, it had been, under full legislative authority to that purpose, to secure a certain amount and description of notes, like bank-notes, to be put in circulation as money. Would any one insist that, if a subsequent mortgage should be given on the same property, which was in terms subject to the lien of the first, the company would in this way be prevented from keeping its old notes in circulation, and taking them in and paying them out as before? Clearly not, I think. And why? Because the nature of the paper secured was such as to preclude such an idea. The notes were put out for circulation. They were to be used as money. When in the possession of the company they were for the time being inoperative, but as soon as they were out their attributes as notes secured by the mortgage were all restored. Such would have been the evident intent of the parties, and such, I am sure, is the effect the courts would give to what had been done.

Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company their lien under the mortgage was suspended; but the moment they were out in the usual course of business, it again took effect as of the time the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments, and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the

mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed.

As Mr. Williams took the bonds direct from the company at a time when he was himself a director, he is charged with notice of the facts. His lien, therefore, would not be good as against the second mortgage if the company had not the power to use them as it did, and transfer a corresponding interest in the mortgage. As I think, it had that power. The bonds were not due, and had not, commercially speaking, been retired or extinguished. It follows that to the extent necessary to secure the note for which they are held, they are entitled to the benefit of the lien created by the terms of the mortgage.

The 210 loose coupons held by Mr. Williams as collateral were cut from bonds pledged to him December 4, 1872. The original loan made at that date was continued by various renewals until 1878, when the bonds, with the matured coupons cut off, were sold, and the proceeds applied to the payment of the debt. A part of the debt still remains unsatisfied, and the coupons cut off are unpaid. I see no reason why they may not be enforced as valid claims under the mortgage. What I have said in respect to the other pledges is equally applicable to this. The same is true of the bonds held by the defendant Moise. There is no dispute as to the debt he holds, or the fact of the pledge in good faith before this suit was begun, and before the bonds were due.

The next questions presented are those connected with the guaranteed South Carolina Railroad bonds, issued under the act of 1865, 10 in number, and £6,000 in all. Nine, of £600 each, are held by the syndicate as collateral to a note of the company to E. L. Trenholm, and the other is also held by the same parties under the general arrangement, which will be considered hereafter. The facts are these: In 1866 the company had in some way got to be the owner of a considerable amount of the old Louisville, Cincinnati & Charleston bonds. For these were substituted an equivalent amount of bonds guaranteed by the state under the act of 1865. All the substituted bonds were afterwards put out by the company, so as to transfer the absolute ownership, except the nine pledged to Trenholm. These were given to him in 1870 as collateral to a loan or loans then made. The original note given for the loan was renewed from time to time, Trenholm still retaining the pledge, until it was purchased by the syndicate, by whom the note and collaterals are now held. I have no doubt that bonds guaranteed by the state under the act of 1865, and actually substituted for a like amount of the issue under the act of 1837, bound the state and the company so as to carry with them the statutory lien, whether issued in lieu of bonds before owned by the company or not. When the company got the guarantee, it could do with the new bonds what it pleased. If actually exchanged for bonds of

1838, and the old bonds taken up and cancelled, they could be negotiated, if they had the guarantee of the state on them, so as to carry the statutory lien which the guarantee brought into operation. The first mortgage did not of itself vacate that lien. When a first mortgage bond was actually put out in place of the old one, the lien under the mortgage was substituted for that of the statute. Since the aggregate of the statutory and first mortgage liens cannot exceed £620,000 of principal debt, it is of no consequence to the second mortgagees whether the bonds ahead rank as one or the other of the acknowledged prior securities. The company was under no obligations to take up the old bonds and put out the new. So long as there were no more out in the aggregate than the second mortgage contemplated, there could be no ground of complaint. It has been suggested that the first mortgage was not to be used until the holders of the four-fifths of the old bonds had signified their assent to the scheme of substitution, and that this assent was not secured until 1871. If that be so, then these bonds were used with Trenholm before they could be properly exchanged. But, however that may be, I am satisfied that the pledge could lawfully be made at the time it was, and that, when made, it transferred as part of the pledge the lien which pertained to the bonds put out. This made Trenholm a holder for value, and his bona fide title protects all who claim under him, whether they be innocent or not. This is an elementary principal in commercial law. These bonds, therefore, to the extent they are required to pay the Trenholm debt, are to all intents and purposes part of the prior lien, subject to which the second mortgage is taken, and to which it is asked the sale may be made.

As to guaranteed bond No. 463, issued under the act of 1865, it was bought by the company in the market before due as an investment. It is clear from the evidence that the company never intended by this purchase to retire it from under the mortgage, but to keep it alive for future use if occasion might require. It was pledged to the syndicate under the agreement which will be considered further on. As it was out, in fact, when this pledge was made, the title of the syndicate is good under the principles which I have just stated. There is a claim of an overissue, however, and as it seems to be conceded that the other securities, if sustained, will be more than sufficient to satisfy any balance that may be due that association, I think the injunction against the negotiation of this bond should be continued in force until such time as it shall be found whether there has been an overissue, or, at least, until it shall be found that the other securities will not pay the debt.

As to the alleged overissue, it is sufficient to say that the case is not now in a condition to enable me to determine that fact. I have already shown that the mortgage is valid to the extent of £620,000. The bonds now out on hypothecation by the company are under-

stood to be more than sufficient to pay the debts for which they are held. In legal effect the amount thus issued is no more than is required for the purposes of the security. The receiver has now in his hands \$2000. Those bonds may now be retired and cancelled. It will be sufficient for all the purposes of this case to order a sale subject to a prior lien in this behalf, not exceeding £620,000 as the principal sum. The difference between that amount and the actual bonds outstanding will not be sufficient to materially affect the sale, and it will be time enough to consider what shall be done with any excess of issue there may be, when it becomes necessary to enforce the earlier liens.

This, I believe, disposes of all the questions presented under this branch of the case except as to the coupons taken up in 1877, and January, 1878, by the syndicate. These will be considered hereafter.

2. As to the second mortgage:

At a meeting of the directors of the company, May 21, 1872, the following resolutions were adopted:

Resolved, As the sense of this board, that some measure of relief for the large and oppressive floating obligations of the company, incurred for valuable improvements, and for acquiring controlling interests in important connecting railroads in danger of passing into unfriendly hands, has become expedient; and, further, that some means of providing for the annually-recurring bond maturities should be devised; therefore be it—

Resolved, That a second mortgage be authorized to be created upon the properties of the company to the extent of three millions of dollars (\$3,000,000); that bonds to that amount under said mortgage be executed, to run 30 years, bearing 7 per cent interest, payable in semi-annual coupons, first of April and first of October, in the city of New York; and whereas, it is a duty we owe to the stockholders in putting a final mortgage upon their property to take every necessary precaution to secure to them the utmost value of the bonds to be issued under the said mortgage, and thereby to accomplish the end proposed, namely, the relief of the company's finances; therefore,—

Resolved, That the president be authorized to sell the said second mortgage bonds at not less than 80 per cent: provided, nevertheless, that he shall take payment for the same in the following manner, viz.: one-third in cash and two-thirds in the unsecured bonds of the company at not less than 80 per cent, when these terms of payment shall be tendered.

At the same meeting it was voted that the privilege of making payment for second mortgage bonds by one-third in cash and two-thirds in non-secured bonds, should extend for one year from the date when the bonds should be prepared for sale, and the proceeds of the bonds should be applied exclusively to the extinguishment

of the floating debt and of the unsecured bonds. The floating debt at this time amounted to something more than \$1,000,000, and the unsecured bonds to \$2,000,000. In accordance with these resolutions, a mortgage, and bonds of \$500 each, amounting to \$3,000,000, were executed. The mortgage recited the substance of the resolution of the directors, and especially that the proceeds of the bonds "were to be applied exclusively to the extinguishment of the floating debt and the retirement of said unsecured bonds." Of the new bonds it is conceded that 2269, amounting to \$1,134,500, were regularly issued, and are entitled to the full benefit of the mortgage security. Twenty-three, equal to \$11,500, are now in the hands of the receiver, subject to the orders of the court, and can at any time be cancelled and retired. The rest are disputed, principally on the ground that, instead of being used to extinguish the floating debt and retire the unsecured bonds, they are pledged to the floating-debt holders as collateral security, whereby the debt was perpetuated rather than got out of the way. For this reason it is contended that the bonds so held are not entitled to an equal lien under the mortgage with those issued so as to bring about an actual extinguishment of old debts.

This makes it necessary to determine what bonds the mortgage really does secure. The controversy is between the bondholders, as to the extent of their respective rights, and, for the purposes of this part of the case, it may be admitted that if bonds in the hands of first takers or their assignees with notice were not regularly issued, their right to the benefits of the mortgage may be disputed by the other parties interested in the security.

The mortgage is not to the unsecured bondholders, or floating-debt holders, or to trustees for their security. It was made to secure bonds, the proceeds of which were to be applied to extinguish the one class of debts and retire the other. The mode in which this was to be done is not provided for. All that is left to the discretion of the company or its officers. No creditor can demand the bonds upon such terms as he may dictate. He must submit to what the company requires, or get no advantage from what has been done. His specific rights under the mortgage all depend on the bargain he makes with the company in that behalf. He may, if the company consents, exchange his claims for bonds, dollar for dollar, or less, or more; but until some arrangement has been made by which a bond secured by the mortgage becomes in some way connected with the unsecured bonds he owns, or the part of the floating debt he holds, he remains just where he was before the mortgage was made.

The original plan was to dispose of the bonds, to be paid for in part by unsecured bonds and part cash. In this way, unsecured bonds would be actually retired by the transaction, and money obtained which could be used to pay the floating debt. At first

the sales were at 80 per cent, but afterwards at 75. The original time limited for taking advantage of this offer was one year, but this was extended. This plan was only partially successful. About \$670,000 of the unsecured bonds are now out, and but little money was actually realized with which to take up the floating debt. In the then financial condition of the country it seems to have been impossible to dispose of the second mortgage bonds on favorable terms, and to gain time the expedient was resorted to of extending the debt, and pledging the bonds as collateral. In this way it seems to have been supposed that temporary relief could be obtained until the bonds could be sold or converted at more satisfactory rates. In effect, the company said to the creditor :

"Your debt is due; we have not been able to sell our bonds, and therefore cannot pay now, but if you will give us time we will secure you with the bonds. If before the debt matures again we can sell the bonds, you shall have the proceeds; but if we cannot, you will have the security, which you can sell and get your money."

It is impossible to say that this is not an application of the bonds, having for its object the extinguishment of the particular debt to which they were attached. If before the debt was due the company had itself sold the bonds, and with the proceeds paid what it owed, the application, it is conceded, would have been in exact accordance with the provisions of the mortgage, and this whether the bonds were disposed of at a greater or less price. I am unable to see any difference, so far as the mortgage is concerned, whether the sale is made by the creditor under the authority of the company, or by the company itself. In either case the proceeds of the bonds are applied to the extinguishment of the debt. As much may not have been accomplished as was hoped for, but the application that has been made is completely within the scope of the mortgage.

Another class of cases reported to the master shows even more pointedly the propriety of this construction. The unsecured bonds were from time to time falling due. Some of the holders were not willing, and perhaps not pecuniarily able, to accept the terms of exchange that were offered, but they were willing to surrender the obligations they held and take a note of the company for the amount due, payable at a future date, with second mortgage bonds as collateral. Some of these propositions were accepted, and the notes with bonds pledged are now out. The old bonds have been retired by the use of the new. There was no actual exchange of bonds, but the new bonds were put in the way of being applied to pay for the old ones. All this, as it seems to me, is within the scope of the mortgage. It may not have been judicious management, but it was within the discretion of the company. The only contract with the individual bondholders is that the mortgage security shall not be diverted from its designated uses. That bonds

sold under a pledge to secure an old debt carry with them the mortgage, cannot, as I think, admit of a doubt. That being so, it is difficult to see how the pledgee, before sale, can be in a worse condition than a purchaser.

Coming now to the consideration of the particular cases, I find that they may properly be divided into four classes:

(1) Debts actually owing at the date of second mortgage, October 1, 1872; (2) notes for unsecured bonds, actually taken up and retired; (3) debts bearing date after October 1, 1872; (4) debts connected with the purchase of certain securities of the Greenville and Columbia Railroad.

As to the first and second classes, nothing need be added to what I have already said. They include all the cases embraced in schedules 7 and 8 of the master's report.

As to the third class, which includes the cases found in schedule 8, while they are, apparently, debts contracted after the second mortgage, I think they are, in reality, only a continuation of those which existed before. The floating debt seems to have been, for a long time, a continuing thing. The amount now owing is substantially what it was when the mortgage was made. The creditors have changed, but not the debt. One note has been paid, directly or indirectly, by putting out a new one. It may not be possible, in all cases, to tell whether a debt to one was paid directly with money borrowed from another, but it is certain that, from a fund made up in part from new borrowings, old loans have been cancelled. The object of the mortgage was to extinguish the existing debt. This is not done by simply changing the creditors. It may be true that the plan adopted by the company has, in fact, perpetuated the debt instead of extinguishing it, but it is clear that extinguishment was contemplated by what was done. If, in the end, the debt had been cancelled by the use of the bonds in this way, there can be no doubt that the lien of the bonds so used would be good. I cannot believe that the pledgee loses his rights simply because the plan has proved a failure.

As to the fourth class, the evidence shows that before the execution of the mortgage the South Carolina R. R. Co. had, by the use of its unsecured bonds or otherwise, become the owner of a controlling interest in the stock of the Greenville and Columbia R. R. Co. The restrictions under which the mortgage was created represent that the large and oppressive debt of the company was incurred, in part, "for acquiring controlling interests in important connecting roads in danger of passing into unfriendly hands." The Greenville and Columbia road was an important feeder to the South Carolina Company. It owed a large debt to the Commercial Warehouse Co., of New York, for which valuable collaterals were pledged; and, besides, there was danger that if the debt was not paid the company would be put into bankruptcy. It was believed

that such a result would be disastrous to the interests of the South Carolina Company. For this reason the South Carolina Company seems to have treated the debt of the Greenville and Columbia Company as its own, and given its own notes to the warehouse company, secured by second mortgage bonds as collateral. This, I think, is fairly within the scope of the mortgage. While, nominally, the debts of the two companies were distinct, the South Carolina Company was as deeply interested in saving the Greenville Company from bankruptcy as that company could be itself. As the new bonds were made to take care of the debt incurred in buying the stock of this company, I cannot but think their lien should be sustained. In addition to this, it appears that these bonds were first put out under this pledge February 19, 1873,—only a few months after the second mortgage. From that day until the commencement of this suit no complaint has been heard from any one. During all this time one of the mortgage trustees was a director of the company. Many of the bonds have been sold under the pledge, and it is now too late to complain of their use or dispute their lien. In all matters affecting their security the bondholders are charged with the knowledge of their trustees. For the purpose of protecting their interests under the mortgage, the trustees are their agents.

Without pursuing this branch of the case further, it is sufficient to say that I am of the opinion that the holders of all bonds now out on pledge by the company are entitled to their proportionate share of the security of the mortgage, to the extent that may be necessary to pay the debts for which they are respectively held, and that all bonds sold under pledges carry their lien with them to the purchaser.

The only question in this part of the case which remains to be considered is as to the rights of the outstanding unsecured bondholders under the second mortgage. It is insisted in their behalf that the mortgage "was a contract between the corporation and its creditors, and constituted a complete and executed trust for the creditors of the company then holding its open and unsecured bonds and its floating debt, for the retirement and extinguishment of which the bonds secured by said deed were to be exclusively applied."

From what I have already said it must be apparent that I cannot agree to this position. Whatever else the mortgage may be, it is certainly not an assignment for the benefit of these two classes of creditors. Neither, as I have before stated, was it intended in any manner for their security, so long as they hold their unsecured bonds or floating debt unaffected by any contract they may make with the company with reference to it. They can only get what they especially bargain for. Neither can they compel the company to make any particular arrangement in their behalf. The company

is at liberty to make its own terms. The terms it once offered the owners of the bonds now outstanding declined to accept. The bonds have since been used. To the extent of their rights under the mortgage they carry to the present holders the security that has been appropriated. It is now too late for others to come in for what is left, if there should be anything. Such others must be content to remain, as they always have been, unsecured creditors of the company.

3. As to the syndicate :

All the questions connected with this part of the case have been disposed of by what has already been said, except those connected with the coupons of the first and second mortgage bonds taken up in New York and Charleston, and the attachment proceedings in Georgia. In respect to the coupons, the first inquiry is whether they were bought by the syndicate, or paid by the company with money advanced for that purpose by the syndicate.

In the early part of 1877 the finances of the company were found by the directors to be again in an embarrassed condition. In some cases interest on the bonded debt had not been paid promptly at maturity, and there was danger of a general suspension unless relief could be obtained. The credit of the company was impaired and the available collaterals mostly in use. Under these circumstances certain of the wealthy and influential directors of the company associated themselves together for the purpose of giving the necessary help. This association is known in the pleadings as the "Syndicate." They agreed with the company to use their personal credit, either by loans, guarantees, or indorsements, to an amount not exceeding \$200,000, in arranging for maturing coupons, interest on bills payable, and such other necessary debts as might mature up to and including January 1, 1878. In consideration of this the company pledged as security all the collaterals it could control, and assigned the current future income as it accrued. In respect to the coupons the provision was as follows :

"And it is further understood and agreed that all coupons of the bonds of the South Carolina R. R. Co. which may mature up to and including the first day of January, 1878, shall be purchased by such certain members of the board of directors hereinbefore set forth, or any one or more of them who may make advances for that purpose ; and that upon their said purchase the said coupons shall be held, kept, and retained by such certain members of the board of directors as may purchase the same, as security for the amounts advanced for such purchase, and the coupons so purchased shall remain in the hands of such certain members of the board of directors, or their agent, who shall be entitled to all the rights, liens, and priorities which may appertain to the same, and to the remedies which can or may be maintained and enforced thereon against the said South Carolina R. R. Co."

In respect to this part of the agreement, as reduced to writing and executed by the president in behalf of the company, it is insisted that it does not follow the instructions of the directors as contained in their resolutions conferring authority on the president in that behalf, and is not, therefore, binding on the company. While the original resolution may not have contemplated precisely such a contract as this, the evidence shows that the agreement, as drafted, was presented to the finance committee of the board, and approved. After that it was executed. The company does not object, but, on the contrary, insists that it be carried into effect. Under these circumstances the present complainants are in no condition to insist that the agreement, as signed, is not actually binding on the company.

That as between the company and the syndicate the coupons were bought, not paid, I think is clear. The argument to the contrary is based upon a misconception of the evidence contained in the books of the syndicate. These books have been treated by the counsel for the complainants as though they had been kept between the company and the syndicate, whereas they are in fact the books of the treasurer of the syndicate, in which are kept all the accounts of that association. The transactions are all entered as with cash; one side of the journal showing receipts and the other disbursements. Thus the first entry on the journal shows a demand loan made by the syndicate from the People's National Bank, consisting of the check of that bank on the Bank of New York for \$20,000, and premium thereon, \$50; in all, \$20,050. On the other side it appears that this check was sent to the National City Bank, of New York, to purchase coupons due April 1st. The railroad company was in no way connected with this transaction. The money was borrowed by the syndicate on its own obligations, and sent to the City Bank, not for the credit of the company, but to buy the coupons. Next in order on the journal is a charge of certain notes, or bills payable, made by the syndicate to raise money on. The company had nothing to do with these notes, and was in no manner whatever bound for their payment. On the other side of the account is found the amount paid for the discount of these notes. In this way is shown the proceeds of the notes made available for the use of the syndicate. On the other side of the journal is then shown the use made of the fund thus obtained. Among other things, the demand loan at the People's National Bank is taken up, and \$20,000 loaned the company. For this loan to the company the bills-receivable account shows that the note of the company was taken. With the rest of the proceeds coupons were bought. These coupons were held by the treasurer of the syndicate as his vouchers for the note to that extent of the funds in his hands, and were charged in the coupon account of the syndicate. The company had nothing to do with this, and no charge is made

against it on the books for any such use of this money. The same will be found true of all the other entries. When money was advanced to the company a corresponding entry is, as a rule, found in the bills-receivable account. Thus, when preparations were made for taking up the sterling coupons, payable in London, the money was advanced to the company and remitted to the agents in London. For these amounts the notes of the company were given to the syndicate. In this way the money was provided to pay the London coupons—not to buy them. Those coupons when taken up were extinguished, and no claim is made for them. They do not and never have appeared in the coupon account of the syndicate. The vouchers held for that advance were the notes of the company. It is not claimed that any coupons were bought except in New York and Charleston.

The books are in reality between the syndicate and its treasurer, and show in what way he has disposed of the funds in his hands. He is, in effect, charged with certain amounts of money, and his books show how it has been disbursed. On settlement he produces, as his vouchers, interest and expenses paid, coupons bought, and bills receivable belonging to the syndicate, consisting of the notes of the company taken up from others, or given for money advanced. It is an error to suppose that all the money charged to him was got from the company, or that all he paid out was either advanced to or charged in account against the company.

The next question is whether, as between the bondholders and the syndicate, the coupons were bought or paid. I shall not undertake to recapitulate the evidence on this point, but content myself with saying that the evidence, as I think, brings the case clearly within the rule laid down by the supreme court in *Ketchum v. Duncan*, 96 U. S. 659. Certainly, there can be no claim of bad faith on the part of the syndicate. In Charleston full as much notice was given that the coupons were bought as was shown in the *Ketchum Case*, and while there was no such notice in New York, the payments were made in a somewhat unusual way, and no one took the trouble to inquire why. I cannot but think that, but for a misinterpretation of the books of the syndicate, this defence would not have been made. The arrangement with the syndicate was, in every respect, fair and honorable. All the members of the association were directors and members of the finance committee of the board. They were to be paid nothing for their services or the risks they assumed. So far as appears they were in no condition to be personally benefited by what was done; and in all the mass of testimony not a word is to be found reflecting on their integrity in the matter. There is nothing whatever in the case to show that the transaction was anything else than a laudable effort on the part of the directors to tide the company over what was supposed to be but a temporary embarrassment, brought about by

an unexpected falling off of business, with the hope that, upon a revival of business, a disastrous failure might be avoided. The bondholders have lost nothing. The money they got when they gave up their coupons is certainly worth as much as their security under the mortgage would be to them now.

But it is still further contended that if the coupons were in fact bought, they have since been paid. This might be true, if, as has been assumed, the coupons were charged in general account against the company, and the payments made from time to time by the company applied to the satisfaction of the several items of charge in the order of their entry; but, as I have already shown, the transaction between the parties never took that form. The syndicate bought the coupons, and has never charged them in account against the company. They were originally taken, and are still hold, as coupons. When money was advanced the company's note was taken, or something equivalent done. No general charge in account was made. As moneys were paid by the company they were credited at large, without any specific application. In this way, at the end of the year, when the contract expired, a large amount stood in open credit to the company. The parties then met and made their adjustments. The credit at large was all exhausted by its application to other purposes than taking up the coupons. This the parties were at liberty to do. From the books it is apparent that the application was actually made and carried into full effect long before this suit was begun. The coupons have never been taken up by the company or cancelled, and there is no rule of law which requires that any moneys which have been paid by the company to the syndicate should be applied to their satisfaction, as against what has been done by the parties. The evidence leaves no doubt on my mind as to what the parties have done.

I see nothing in the reports of the directors to the stockholders to estop the syndicate. It is true that all the members of the syndicate were directors, and no doubt cognizant of what the report contained. No one could have been deceived by the accounts as stated. Evidently they were intended to show the results of the business of the year. At once the stockholders referred the report to a committee, which reported, on the tenth of April, that the syndicate had raised the money to take care of the interest, and were "protected by holding the coupons so taken up." Before the meeting was held to which this report was made, the default had occurred in the payment of interest on the second mortgage, by reason of which this suit was brought.

I think, therefore, that the syndicate cannot be required to refund the money paid by the receiver under a former order in this cause to take up their first mortgage coupons, and that they are entitled to the benefit of the mortgage security applicable to those of

the second mortgage, which they hold. If these coupons are not paid in full from the proceeds of the mortgage security, the balance will become part of the general debt against the company, for which the other collaterals were pledged under the original agreement. The assignment of the income of the road was vacated by the receivership, under which the possession was taken for the benefit of the second mortgagees.

The question of the attachment by the syndicate in Georgia need not be considered, as it was conceded on the argument that, if the pledges which the syndicate held were sustained, the attachment need not be enforced.

4. As to sales of parts of the mortgaged property:

So far as the trustees of the mortgages have sold the property and invested the proceeds, the securities they hold in lieu of the property are subject to the order of the court, and may be dealt with as the circumstances require. If, as is stated, a part of these securities consists of first mortgage bonds, it is proper that they should be delivered up and cancelled. Such an investment is equivalent to a substitution of the bond for the property, and an extinguishment of the mortgage lien to that extent.

In the present condition of the case, no decree can be rendered against the trustees for moneys in their hands, or which have been misappropriated. They have never been called on to answer, and there are no allegations whatever against them. It will be time enough to consider their liability when proceedings in that behalf shall have been instituted in some appropriate form.

As to property sold and conveyed by the trustees of both mortgages, the lien of the mortgages is gone, and the title of the purchasers good. In respect to purchasers who have no conveyances from the trustees, the case is in no condition for a decree under the present pleadings, and, with the present parties, all that can be done is to order a sale of the property not actually conveyed by the second mortgage trustees, leaving the purchasers to such remedies as they may have.

5. As to the attachment by the People's Savings Bank in Georgia

After the great length to which this opinion has already been extended, I am not inclined to consider this question in detail. The conclusion I have reached is that the lien of the attachment is superior to that of the mortgage in Georgia. The first record of the mortgage in that state was not good as against attaching creditors, and it is not pretended that this bank was not at liberty to pursue such remedies as the law gave for the collection of debts. As the amount is comparatively small, and it is better to have the property sold free of such a lien, I think an order should be made directing the receiver to pay any balance that may remain due after the funds reached by the process of garnishment and not actually

paid over to the receiver have been applied, as far as they will go, to the satisfaction of the judgment that has been rendered in this action in the Georgia court.

6. As to the wharf property in Charleston, which is subject to the lien of certain special mortgages :

There is no dispute about the priority of the lien of the special mortgages on this property, or as to the amount which is due. The decree should order a sale subject to these liens, and providing that the purchaser should not by his purchase become personally bound for the payment of any balance of the debt that may remain after the mortgaged property is exhausted, if he should not desire to pay off the encumbrances and keep the property.

At the close of the argument it was suggested that a reference ought to be made to determine what property was covered by the lien of the second mortgage. There is nothing in the case as it now stands to enable me to determine as to the necessity for such an order, or whether if made at all it should be before a sale. That question is therefore left open, to be settled when the details of the decree shall come up for consideration.

A decree may be prepared in accordance with this opinion. The complainants are entitled to a sale of the mortgaged property, subject to the ascertained prior encumbrances, but until such a decree is prepared the injunction heretofore issued in this cause shall remain in force.

THOMAS HOPPER

v.

THE TOWN OF COVINGTON.

(United States Circuit Court, District of Indiana.)

The power in a municipal incorporation to make contracts and expenditures carries with it the implied power to incur indebtedness, and to issue proper obligations therefor.

But such implied power does not confer upon it authority to issue commercial security bearing all the incidents of commercial paper.

When a municipality or its officers are invested with authority to issue bonds and to decide whether the condition exist under which a special enactment authorizes the issue of such securities, and such officers issue bonds reciting the existence of the necessary conditions, the recital is itself a condition which is conclusive against the municipality in favor of a bona fide holder.

But in a suit on a coupon where a copy of the bond from which it was detached is not made a part of the complaint; or where the complaint does not contain any allegation as to the bond's tenor and effect, the purpose of its issue, or the authority for it, the complaint is bad on demurrer.

There is no presumption that the bond from which the coupon was cut was issued in pursuance of an act of the legislature, and that all the necessary conditions requisite to its issue had taken place previously thereto, where such bond does not contain a recital of the conditions necessarily precedent to its issue.

McDONALD & BUTLER, for plaintiff.

Thomas F. Davidson, for defendant.

GRESHAM, W. Q. (District Judge).—This is an action on interest coupons, alike except in number, one of which reads as follows:

"\$8. COVINGTON, IND., October 1, 1876. One year after date the Town of Covington will pay to the bearer, in the city of New York, eight dollars, being one year's interest on bond No. 14.

"A. GERT, President.

"Attest: FRANK M. HICKS, Clerk."

It is alleged in the complaint that the town of Covington executed certain bonds to which the coupons in suit had been attached. Copies of the bonds are not filed with the complaint; there is no allegation as to their tenor and effect, the purpose of their issue, or the authority for it. To this complaint a demurrer is interposed, which presents the question under consideration.

Power is given by a statute of Indiana (1 Davis, 348) under specified conditions to cities and towns to issue bonds not exceeding \$50,000, payable in not less than one or more than twenty years to provide means for school purposes. And in Section 27 of another statute (1 Davis, 881) it is declared that towns shall not have power to borrow money, or incur any debt or liability except upon the petition of the citizen owners of five-eighths of the taxable property.

It is insisted in support of the demurrer, that the power to issue negotiable bonds is not inherent in a municipal corporation; that if it exists in a given case, it must be exercised in the mode and for the purpose prescribed in the act conferring the authority, and that in an action upon the bonds of a municipal corporation, containing no recitals, the declaration must show authority to issue the bonds sued on, and its exercise in the mode and upon the conditions prescribed by law.

In support of the complaint, it is contended that municipal corporations in Indiana have power to issue commercial paper for some purposes; that public officers are presumed to act in accordance with, and not contrary to the law, and that the plaintiff had a right to buy the coupons as commercial paper, without inquiry, presuming they were issued for a proper purpose, and under authority of the statutes just mentioned.

Municipal corporations are created to secure to the people residing within their jurisdiction the benefits of local government, and not for business purposes. Unlike trading or business corporations, their powers are governmental and administrative. In addi-

tion to the power to raise revenue by taxation, and other express powers conferred upon them by their charters, they may exercise such incidental powers as are necessary to enable them to accomplish the object of their being. The power to make contracts and expenditures carries with it the implied power to incur indebtedness, and to issue proper obligations therefor. But it does not follow that, because municipal corporations, in the exercise of their legitimate and ordinary jurisdiction, may incur indebtedness and issue vouchers, orders or other instruments for the same, they may issue commercial securities, payment of which will be enforced against the tax-payers, in favor of bona fide holders, however irregular or fraudulent the issue may be.

The court, in *Mayor v. Ray*, 19 Wall. 477, say: "If in the execution of their important trusts the power to borrow money and issue bonds or other commercial securities is needed, the Legislature can easily confer it, under proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. . . . No such power ought to exist, and, in our opinion, no such power does exist, unless conferred by legislative enactment either express or clearly implied."

While concurring in the judgment of the court, but dissenting from some of the grounds upon which it was based, Justice Hunt said that in his opinion a municipal corporation might borrow money for legitimate uses and issue its commercial paper for the same, unless expressly prohibited by its charter or by some statute from so doing. (*Police Jury v. Britton*, 15 Wall. 566; *Hitchcock v. Galveston*, 2 Woods. 272; *Chisholm v. City of Montgomery*, 2 Woods. 584).

But while municipal corporations cannot borrow money or issue commercial securities without legislative authority, express or clearly implied, it is nevertheless the law in the Federal courts that when a municipality or its officers are invested with authority to issue bonds and to decide whether the conditions exist under which a special enactment authorizes the issue of such securities, and such officers issue bonds reciting the existence of the necessary conditions, the recital is itself a decision by the appointed tribunal, which is conclusive in favor of a bona fide purchaser. (*Coloma v. Evans*, 2 Otto, 481.)

In *Buchanan v. City of Litchfield*, 12 Otto, 278, the city issued its water bonds, amounting to \$50,000, to aid in constructing and maintaining a system of water works. The bonds recited that they were issued under and in pursuance of a particular act of the legislature and a city ordinance, which authorized the issue, and the plaintiff was a bona fide holder. The court held that the bonds were void, because they created an indebtedness in excess of the amount to which the municipality was restricted by the State Con-

stitution. "As, therefore," says Justice Harlan, in delivering the opinion of the court, "neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their indebtedness, it would seem that, if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the Constitution were met—that is, that the city indebtedness, increased by the amount of the bonds in question, was within the Constitutional limit—then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against the bona fide holder of its bonds. . . . The present action cannot be maintained unless we should hold that the mere fact that the bonds were issued without any recital of the circumstances bringing them within the limit fixed by the Constitution was in itself conclusive proof in favor of a bona fide holder; that the circumstances existed which authorized them to be issued, we cannot so hold."

This case clearly supports the doctrine that municipal bonds which contain no recitals are not unimpeachable in the hands of bona fide holders for value; that is to say, they are not commercial paper.

It is not claimed that the town of Covington had any general or incidental power to issue bonds or other commercial paper, but it is asserted for the plaintiff that when a municipality has express authority, as in this case, to issue bonds for one purpose, it may issue its securities with or without recitals, and it will be conclusively presumed in favor of purchasers for value without notice, that the issue was authorized. It would follow, if this be true, that when express authority exists for the issue of municipal bonds for one purpose, bonds which are issued without recitals for an unauthorized and fraudulent purpose will be enforced against the tax-payers in favor of purchasers for value, without notice; and that an act conferring authority upon municipalities to issue bonds, under clearly defined conditions and restraints, for a particular purpose, confers authority, as between the municipality and bona fide third parties, to issue commercial securities for all purposes.

The cases of *Gilpeck v. City of Dubuque*, 15 Wall. 175; *Supervisors v. Shenck*, 5 Wall. 772; *City of Lexington v. Britton*, 14 Wall. 296, and *San Antonio v. Mehaffy*, 6 Otto, 314, are cited as showing that when a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances that gave the requisite authority, that they are no more liable to be impeached in the hands of such a holder than any other commercial paper, and that recitals are not necessary to estop the municipality. In three of these cases there was express authority to

issue the bonds sued on, and they contained recitals showing that the proper officers had decided the precedent conditions existed upon which the power depended; while in the other—*Supervisors v. Shenck*—although it does not expressly appear that the bonds sued on contained recitals, that is the fair inference, for the court say it is settled law that a negotiable security of a corporation, which on its face appears to have been duly issued, is valid in the hands of a bona fide holder.

It is further urged for the plaintiff that even if the bonds and coupons mentioned in the complaint are impeachable in the hands of the plaintiff, the question before the court is one of pleading, and it devolves upon the defendant to show that the bonds were issued without authority. The coupons contain no recitals, and there is no allegation in the complaint that the bonds do. The argument of counsel on both sides assumes that there are no recitals in the bonds. The plaintiff was bound to know that the bonds were issued under express legislative authority for school purposes, and it was his duty to inquire whether the conditions existed that authorized them to be issued. Power to issue commercial paper was the exception and not the rule, and in the absence of such recitals as would preclude the municipality from impeaching the bonds in the hands of a bona fide holder, the plaintiff has no right of action, unless he shows in his complaint that the bonds were issued in substantial compliance with the legislative enactments and for a proper purpose. Bonds which are not issued in pursuance of express legislative authority, and in mode prescribed by it, possess none of the qualities of commercial paper. The legislature was careful, in conferring power on municipalities to borrow money and issue bonds for school purposes, to prescribe the mode and manner of its execution, thereby making the mode of its execution the measure of the power granted. (*Anthony v. County of Jasper*, 11 Otto, 697.)

Demurrer sustained.

MOORE

v.

HANOVER JUNCTION AND SUSQUEHANNA R. R. Co.

(94 *Pennsylvania Reports*, 824. May 17, 1880.)

A contract of subscription to stock provided for the building of the H. J. & S. Railroad according to the survey made by the P. & R. R. R. Co. The original route ran within five hundred feet of M.'s mill. This route was changed so as to make it run about twelve hundred feet from said mill. M. contended that this change was material; that it was the location of the original survey that induced his subscription and that his interests were seriously compromised by the alteration, and in a suit against him on his subscription offered evidence to this effect, which the court rejected. *Held*, that the court erred, and that he should have been permitted to show that the alteration in the route was, as to him and his interest, a material variation.

Miller v. Hanover Junction & Susquehanna R. R. Co., 6 Norris 95, distinguished.

MAY 5th, 1880. Before MERCUR, GORDON, PAXSON, TRUNKY and STERRETT, JJ. SHARSWOOD, C. J., and GREEN, J., absent.

Error to the Court of Common Pleas of Lancaster county: Of May Term 1880, No. 118.

Assumpsit by the Hanover Junction and Susquehanna R. R. Co. against Michael Moore, to recover on a subscription to the stock of said company. Defendant pleaded non assumpsit.

By an act approved March 28th, 1872, the Hanover Junction and Susquehanna R. R. Co. was created a corporation, and it was so decided in R. R. Co. v. Haldeman, 1 Norris, 36. It was authorized to build a railroad from "a point at or near Hanover Junction, in York county, extending to the west bank of the Susquehanna river, in York county." It was also authorized "to build a bridge across the Susquehanna river at the most convenient point, to enable them to connect with any other railroad constructed, or that may hereafter be constructed, on the east side thereof, and to extend their railroad on the west side of said river to said bridge, and across on the same to the points of annexion with such other railroads as aforesaid."

The company has not built any railroad on the west side of the river, nor any bridge across the river, but it took subscriptions towards what it commonly calls "The eastern extension of the Hanover Junction and Susquehanna Railroad," which subscriptions contained the following conditions:

"And it is further agreed, that we, the citizens of Marietta and vicinity, do subscribe the amount opposite our respective names, on the following conditions, viz:

"That the amount hereby subscribed shall be devoted to the building and equipping of the extension of the Hanover Junction and Susquehanna R. R., according to the survey made by the Philadelphia and Reading R. R. Co., the same having been adopted at the last meeting of the Hanover Junction and Susquehanna R. R. Co., and it is further agreed, that there shall be a first-class station erected in Marietta by said company.

"Further, the said subscription shall only be paid when the sum of \$100,000 shall have been subscribed for this purpose, by the citizens residing at or near the line of said above extension in Lancaster county."

This route, commonly called the Reading survey, was well known; it passed through the land of M. H. Moore, defendant, about five hundred feet from the flour-mill, and, at the time he subscribed in 1873, was staked out through his land, and he was assured that it was under contract and would be built. After he subscribed, and after the road was under contract for grading, the company changed the route, abandoned the route of the "Reading survey," and adopted and graded another line twelve hundred feet further away from Moore's mill, and entirely off his land, and changed the terminus at the Reading and Columbia R. R. nearly a mile, and the change Moore alleged was injurious to him. This was done without any consultation with or consent of Moore, and without any waiver by him of the conditions in the subscription.

At the trial, before Livingston, P. J., the defendant offered to show that if the road had been built, as staked out through his property at the time he subscribed, it would have been an advantage to his mill property and his milling operations, and that as it is, graded outside of his land and further away from his mill, it is of no advantage.

Plaintiff objected and the court rejected the offer. (Eighth assignment of error.)

Also, to show that at the time he made the subscription he would not have made it, if the road was to be built on any other route than the one staked out through his property, and that this road as

staked out through his property was the inducement for him to make the subscription.

Objected to and objection sustained. (Ninth assignment.)

Also, to ask a witness the following question, which the court disallowed: "Would you have subscribed at the time you did, if you had been informed or had known that the road would be graded or built where it now is, and not on the line that was then staked out?" (Seventh assignment.)

The first point of the plaintiff, which the court affirmed, was as follows: If the jury believe that the railroad was to be built between some point on the Susquehanna river and the Reading and Columbia R. R., in accordance with the terms of the charter of the corporation plaintiff the defendant having failed to show that the modifications of the original survey were not in accordance with what was the understanding of the subscribers as to the real object to be effected, and having failed to show that they were not useful to the public and were prejudicial to the company, the verdict must be for the plaintiff. (First assignment.)

The court directed the jury to find for the plaintiff. (Sixth assignment of error.)

The first point of the defendant, which the court refused, was as follows: The condition in the subscription signed by the defendant, that the amount thereby subscribed shall be devoted to the building and equipping of the extension of the Hanover Junction and Susquehanna R. R., according to the survey made by the Philadelphia and Reading R. R. Co., if said location was the inducement to the defendant's subscription, is valid and binding on the plaintiff, and any change made by the plaintiff of such location or line injurious and disadvantageous to the defendant would release the defendant from his subscription. (Third assignment.)

Verdict accordingly, when defendant took this writ and alleged that the court erred, inter alia, as set forth in the foregoing assignments of error.

E. D. North and H. M. North, for plaintiff in error.—In *Miller v. Hanover Junction & Susquehanna R. R. Co.*, 6 Norris 95, it was decided that the subscriber to this same subscription paper could not set up a parol condition for a line different from that mentioned in the subscription, that he could not set up a condition not in the subscription, and now the court below decides that Moore cannot set up the one that is in the paper. Moore being bound by the written contract, the company and the other subscribers must also be bound. If he could not show a different contract, why should they be allowed to set aside their agreement made with him, and enforce on him an agreement of their own, to which he never gave his consent and which would be of no advantage whatever to him

and which he never would have made. The court below affirmed plaintiff's first point and thereby said that it was the duty of the defendant "to show that the modifications of the original survey were not in accordance with what was the understanding of the subscribers as to the real object to be effected, and to show that they were not useful to the public and were prejudicial to the company." In the *Miller* case, the court said the understanding of the subscribers was in the written subscription, and no other could be shown, and now the court below says Moore should have shown that there was no other than the one in the writing—that he could not establish his contract by producing the writing, but must show there was no other understanding. Any change in the route material or injurious to the subscriber, releases him: *Plank Road Co. v. Arndt*, 7 Casey, 317; *Culey v. R. R. Co.*, 30 P. F. Smith, 363; *Miller v. P. & O. R. R. Co.*, 4 Wright 239.

The offers of evidence were to show that the line of the Reading survey was the inducement to Moore to subscribe, that he would not have subscribed to the line as graded, and that the former would have been a benefit, and that the latter was of no advantage to him.

We admit that under our theory, if the defendant could rest his defense on the violation of the written conditions by the company, the offers would be irrelevant, but under the theory of the court that the violation by the company must be a material one, they were clearly admissible: *Caley v. Railroad Co.* supra. See also *Plank Road Co. v. Arndt*, supra.

George Nauman, William B. Given and S. H. Reynolds, for defendant in error.—The authorities cited by the plaintiff in error are all applicable to a case where a contract is made between a subscriber and the company alone, and where there are no other parties interested. In this case the contract was made with others. We submit that, in the first place, to release a subscriber there must be an alteration of the termini, or of a material part of the route. In *Caley v. P. & O. R. R. Co.*, 30 P. F. Smith, 369, it is said that to effect a release the company must determine to abandon the termini or some material part of the route. And in *Plank Road Co. v. Arndt*, 7 Casey 317, it is held that there must be an alteration of one of the termini to discharge the subscriber. In this case there was no change of the termini, or alteration of any material part of the route. In fact, there is no case in which it has been held that a change of intermediate points, if not material to the enterprise, was sufficient to release a party subscribing. But in a case like this, we contend that where there is an alteration of the route, it must, to avail any one, be one which discharges all. There must be such a material change in the enterprise as dis-

charges all. A mere inconvenience to one is not enough. Modifications and improvements useful to the public and beneficial to the company, and in accordance with the understanding of the subscribers as to the real object to be effected, do not impair the contract of subscription: *Everhart v. Railroad Co.*, 4 Casey 353.

GORDON, J.—The main principles involved in this case were examined and passed upon in the case of the Hanover Junction and Susquehanna Railroad Co. v. Haldeman, 1 Norris 36. There, with the same corporation and same subscription list, as in the case now under consideration, it was, by this court, determined that the defendant's subscription was properly treated as conditional, that the plaintiff had the power to bind itself to the performance of the stipulations contained in such subscription, and that a want of performance thereof by the company would release the subscriber. In like manner it was held in *Caley v. the Philadelphia and Chester County Railroad Co.*, 30 P. F. Smith 363, that where the subscription paper set out the termini and route of the proposed improvement, a material variance from either would operate as a release of a subscriber. As a reason for such conclusion it was said: "If the above-stated doctrine be not correct, then has the defendant no remedy; for, as the directors, in changing the route of their road, are acting within the power conferred by the charter, he cannot prevent such change, though violative of the terms of the contract. He therefore occupies much the same position, in which, as we have shown, the general stock subscriber is placed when such change is made by virtue of an Act of Assembly." Following these authorities, and the conclusion necessarily results that the court erred in not permitting the defendant to show that the alteration made by the company in the original route of its road, was, as to him and his interests, a material variation. The written contract to which he put his name, provided for the building of the extension of the Hanover Junction and Susquehanna Railroad, "According to the survey made by the Philadelphia and Reading Railroad Company," and this ran, it is said, within 500 feet of the defendant's mill. If then this was the contract of the parties, on what ground may the plaintiff recede from its part of the bargain and yet hold the defendant? Is it on the ground that a change of a few hundred feet from the original survey is immaterial, and, therefore, the defendant is not harmed? But this is the very point of the controversy, and who is to determine it? The defendant contends that this change was material; that it was the position of the original survey which induced his subscription, and that his interests are seriously compromised by the alteration. If, as was held in *Everhardt v. the Railroad Co.*, 4 Casey 339, per Woodward J., an essential modification in the charter of a company, either as

to its objects or methods of execution, will release a general subscription, much more will the direct act of the company, destructive of the terms and conditions of its own contract, work such release. To all the subscribers to the stock of the corporation plaintiff but the defendant the alteration complained of might be indifferent, or even advantageous, hence they could not be heard to complain, whilst as to him, it might be very injurious: a material violation of his contract. To this conclusion the case of *Miller v. Railroad Co.*, 6 Norris 95, has been opposed, but this case and the one in hand are as wide apart as the poles. In that case the defendant, Miller, set up a secret parol condition in order to defeat his subscription, but it was held that he could not be permitted so to do, on the ground that it would be unjust and a fraud upon his co-subscribers to permit him, on such grounds, to escape responsibility, and thus throw upon them an additional burthen. But the defendant, in the case in hand, is attempting to set up no secret parol arrangement, but a condition found in the subscription paper itself, and one to which all knew the company was to be held. We have, therefore, no hesitation in sustaining the 3d, 6th, 8th and 9th exceptions of the plaintiff in error. Not so the 7th exception. The defendant might have been asked whether or not the line of the proposed road, as found upon the ground running through his land, was an inducement for his subscription, but it partakes too much of the character of guess work for any one to undertake to say what he would have done under circumstances at the time unknown and unthought of. The plaintiff's first point ought to have been refused; the doctrine involved in it, as a general rule, is no doubt correct, but it is not applicable to the present case without material modification. The remaining exceptions are dismissed as containing nothing tending to convict the court of error.

The judgment is reversed and a new *venire* ordered.

The above case raises the interesting legal question as to when a subscriber to the capital stock of a railroad company is relieved from liability on his subscription by reason of the failure of the company to comply with the terms of the contract of subscription. Many cases have been decided upon this point in the various States and in England. The aim of the present note is to give a synopsis of the law on the question.

It is well settled that any material variation on the part of the company from the original contract of subscription will release the subscriber from liability. *Hartford, etc., R. R. Co. v. Croswell*, 5 Hill, 388. This is in accordance with the general principles of jurisprudence. The subscriber must be presumed to have contracted with reference to the actual or projected state of affairs at the date of his subscription, and if material changes be made in that state of affairs he may most properly and justly say *non in hoc*

fœdera veni. Hence where after the date of the subscription the projected corporation is divided into several and distinct concerns, the subscriber will be released. *Indiana & E. Turnpike Co. v. Phillips*, 2 Penn. 184; *Marsh v. Fulton Co.*, 10 Wall. 676; *Carlisle v. Terre Haute, etc.*, R. R. Co., 6 Ind. 316. Although not where there is a mere apportionment of the road into sections without impairing the unity of the projected corporation. *Ross v. Chicago, B. & Q. R. R. Co.*, 77 Ill. 127.

The subscriber will also be relieved from liability where the projected enterprise is after the date of his subscription sold to another company. *South Ga. & F. R. Co. v. Ayres*, 56 Ga. 230. Or where a consolidation is effected with companies owning connecting or adjacent roads. *Tuttle v. Mich. A. L. R. Co.*, 35 Mich. 247; *Clearwater v. Meredith*, 1 Wall. 25; *N. J. Midland R'y Co. v. Strait*, 6 Vroom, 322. But see *Spragus v. Illinois River R. R. Co.*, 19 Ill. 174; *Hanna v. Cinn. & Ft. Wayne R. R. Co.*, 20 Ind. 80.

The most frequent class of cases, however, in which a subscriber is relieved from liability is that of which the principal case forms an example, viz., where the contract of subscription provides that the road is to run through a certain locality. In this case, if the route be materially altered, the liability of the subscriber is at an end. *Witter v. Miss. O. & R. R. Co.*, 20 Ark. 463; *Manheim, P. & L. Turnpike Co. v. Arnat*, 31 Pa. St. 817; *Sprague v. Illinois River R. R. Co.*, 19 Ill. 174; *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 N. Y. 336; *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268; *Hartford, etc., R. R. Co. v. Croswell*, 5 Hill, 383; *Md., etc., R. R. Co. v. Phillips*, 2 Penn. 184; *New Orleans, etc., R. R. Co. v. Harris*, 27 Miss. 517; *Hester v. Memphis, etc., R'y Co.*, 32 Miss. 378; *Winter v. Muscogee R'y Co.*, 11 Ga. 438; *Kenosha, etc., R. Co. v. Marsh*, 17 Wisc. 18; *Champion v. Memphis, etc., R. Co.*, 35 Miss. 392. But see *Barret v. Alton & S. R. Co.*, 13 Ill. 504; *Delaware R. Co. v. Tharp*, 1 Houst. 149; *Johnson v. Pensacola & G. R. Co. v. Preston*, 35 Iowa, 115; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 23.

The reason of this rule is clear. The subscriber is generally induced to contract by the expectation that the railroad will run in the neighborhood of real estate, of which he is seised or in which he has an interest, and if it fails to do so, the chief motive for his subscription is at an end. Under such circumstances it would be in the highest degree unjust to hold him to his contract. It is not, however, every alteration in the plan or organization of the company that will serve to release the subscriber. Mere unimportant changes will have no effect upon his liability. *London & B. R. Co. v. Wilson*, 6 Bing. N. C. 185; *Gray v. Monongahela Nav. Co.*, 10 Watts, 864; *Sprigg v. Western Telegraph Co.*, 46 Md. 67; *Clearwater v. Meredith*, 1 Wallace, 25.

An extension of the time prescribed for beginning and ending the construction of the road will not therefore discharge him. *Taggart v. Western Maryland R. R. Co.*, 24 Md. 568; nor an abbreviation of the time for notice of calls. *Illinois River R. R. Co. v. Beers*, 27 Ill. 185; nor a change in the regulations as to the payment of calls. *Illinois River R. R. Co. v. Zimmer-*

20, Ill. 654; nor the extension of the corporate existence for a short period beyond that originally prescribed. *Union Agricultural & S. Ass'n v. Neill*, 31 Iowa, 95; nor the making of a change in the method of appointing directors. *New Haven & D. R. Co. v. Chapman*, 38 Com. 56; nor the transferring to the directors the power to increase the capital stock of the company, which power was at the time of the subscription reposed in the stockholders. *Payson v. Stoeber*, 2 Dill. 427; *East Tenn. & V. R. Co. v. Gammon*, 58 Nud. 567; nor the conferring upon the corporation the power to issue preferred stock. *Rutland R. R. Co. v. Thrall*, 35 Vt. 586; *Everhart v. Phila. W. & C. R. Co.*, 28 Pa. St. 389; or to execute a mortgage of its franchises and of the road. *Jay v. Jackson and M. Plank Road Co.*, 11 Mich. 155.

A mere change in the denomination of the shares will not suffice to relieve a subscriber from liability. *Sewall's case*, L. R. 3 ch. 181; *Felling's case*, L. R. 3 ch. 714; *Kennebec, etc., R. R. Co. v. Waters*, 84 Me. 369; nor a change in the name of the corporation. *Buffalo, etc., R. R. Co. v. Dudley*, 14 N. Y. 336; *Milwaukee, etc., R. R. Co. v. Field*, 12 Wisc. 840; nor a reduction in the length of the proposed road. *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465; nor an extension thereof. *Cross v. Peach Bottom R. R. Co.*, 1 Am. & Eng. R. R. Cas. 366; nor the conferring of additional powers and privileges upon the company, even though the liability of every stockholder may be thereby increased. *Gray v. Monongahela Nav. Co.*, 2 W. & S. 156.

It has likewise been held that the conferring upon a railroad company of a power to construct a canal in lieu of a portion of its line will not relieve a subscriber to its stock from liability on his subscription. *Midland Ry Co. v. Sardon*, 10 M. & W. 808. But this case seems, to say the least, doubtful.

Whether the passage of a legislative enactment after the date of the subscription authorizing an increase in the capital stock is sufficient to relieve a subscriber from liability seems doubtful. Some authorities seem to indicate that it is not. *Payson v. Withers*, 5 Biss. 276; *Pullman v. Upton*, 96 U. S. 329; *Schenectady, etc., R. R. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo, etc., R. R. Co. v. Dudley*, 14 N. Y. 336. Others are clear that it is. *Hughes v. Antietam Mfg. Co.*, 84 Md. 316; *Marietta and O. R. Co. v. Elliott*, 10 Ohio St. 57. If a subscriber does not expressly withdraw after the passage of the act increasing the capital, but continues to hold himself out to the world as a stockholder, he will be estopped on the insolvency of the corporation from denying his liability. *Chubb v. Upton*, 95 U. S. 665; but will not, according to some authorities, be so estopped in an action of assumpsit against him by the corporation for calls. *Macedon, etc., Plank Road Co. v. Lapham*, 18 Barb. 312; *Middlesex T. R. Co. v. Lock*, 8 Mass. 268; *Stevens v. Rutland, etc., R. R. Co.*, 29 Vt. 545.

If the subscriber has either expressly or by implication given his assent to the change in the plans or organization of the corporation, he is not, of course, released from liability. *Mourey v. Indianapolis & O. R. Co.*, 4 Biss. 78; *Booker's case*, 18 Ark. 338; *Chetlam v. Republican L. I. Co.*, 86 Ill. 220;

Bedford R. Co. v. Bouser, 46 Pa. St. 29; Martin v. Pensacola & G. R. R. Co., 8 Fla. 370; May v. Memphis Branch R'y Co., 48 Ga. 109; Payson v. Stoever, 2 Dul. 427; Hayworth v. Junction R. R. Co., 18 Md. 348.

If at the time the subscription is made the charter is already in existence, and a power is conferred thereby to make the changes, which are afterwards effected, the subscriber will be presumed to have contracted with reference to the possibility of such changes, and hence will not be relieved from liability by the making of them. East Lincoln v. Davenport, 94 U. S. 801; Nugent v. Supervisors, 19 Wall. 241; Noyes v. Spaulding, 27 Vt. 490; Newhall v. Galena & C. U. R. R. Co., 14 Ill. 278; Ottawa, C. & F. R. V. R. Co. v. Black, 79 Ill. 262; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Burlington and M. R. Co. v. White, 5 Iowa, 409.

The same principle applies where the charter is not in existence, but the contract of subscription contains clauses which empower such changes. Cork and Youghall R. R. Co. v. Paterson, 16 C. B. 414; Nixon v. Brownlow, 2 H. & N. 455; Illinois River R. R. Co. v. Beers, 27 Ill. 185. Or where the provisions of some general law authorize them. In such case neither the increase of the capital stock (Pacific R. R. Co. v. Hughes, 23 Mo. 391), the extension of the railroad (Pacific R. R. Co. v. Renshaw, 18 Mo. 210), the consolidation with other companies (Scotland v. Thomas, 94 U. S. 682), nor other change whereby the liability of the stockholders is increased (Meadow Dam Co. v. Gray, 30 Me. 547) will discharge any of them from the obligation incurred by the contract of subscription.

Subscriptions to the stock of railroad companies are not unfrequently made upon the express condition that the railroad shall be so constructed as to pass through a certain locality. This condition, when embodied in the contract of subscription, is generally held to be a valid one; and a compliance therewith on the part of the company is therefore a necessary prerequisite to liability on the part of the subscriber. Mansfield, C. & L. M. R. Co. v. Brown, 26 Ohio St. 223; same v. Stout, 16 ib. 241; Parks v. Evansville, I. & C. S. L. R. Co., 23 Md. 567; Henderson & N. R. Co. v. Leavell, 16 B. Mons. 858; Caley v. Phila. & C. County R. R. Co., 80 Pa. St. 363; Burlington & M. R. Co. v. Boestler, 15 Iowa, 555; Merriell v. Reaver, 50 Iowa, 404; Bucksport & B. R. Co. v. Brewer, 67 Me. 295; Detroit, etc., R. R. Co. v. Stames, 38 Mich. 678; Spartanburg & V. R. Co. v. De Graffenreid, 13 Rich. 675.

In New York, however, such a condition is deemed void and as contrary to public policy, because it has a tendency to fix the location of the road so as to subserve private rather than public interests. Utica and S. R. Co. v. Brinckerhoff, 21 Wend. 139; Ft. Edw. & Ft. M. Plank Road Co. v. Payne, 15 N. Y. 488. And in Pennsylvania, though such a condition will be deemed valid if inserted in a contract of subscription made with the company after the granting of its charter, it will be deemed void if inserted in a contract with commissioners to collect subscriptions entered into prior to the obtaining of the charter.

Bavington v. Pitts. & S. R. Co., 84 Pa. St. 358; Cally v. Phila. & C. C. R. Co., 80 Pa. St. 368; McCarty v. Selinsgrove & N. B. R. R. Co., 87 Pa. St. 332; Boyd v. Peach Bottom R. R. Co., 1 Am. & Eng. R. R. Cas. 681; and see Taggart v. West Md. R. R. Co., 24 Md. 568.

It is quite clear that parol conditions entered into with the subscriber at the time of subscription, either with reference to the location of the road or organization of the company, are void. Not only is it contrary to the general rules of evidence to allow such parol stipulations to be made part and parcel of a written contract, but in addition it would be in the highest degree impolitic to give them such an effect in this particular instance. Persons dealing with the company must necessarily rely upon the contract of subscription as committed to writing, and would have no security if they were liable to be effected by parol stipulations of which they have no possible means of notice. Kennebec & B. R. Co. v. Waters, 84 Me. 369; White Mts. R. R. Co. v. Eastman, 84 N. H. 124; Conn. & P. R. R. Co. v. Bailey, 24 Vt. 465; Ridgefield & N. Y. R. R. Co. v. Brush, 43 Conn. 86; Tuckerman v. Brown, 83 N. Y. 297; Fox v. Allansville, etc., Turnpike Co., 46 Md. 81; Miller v. Hanover Junction R. R. Co., 87 Pa. St. 95; Melvin v. Lamar Ins. Co., 80 Ill. 446; Henry v. Vermillion & A. R. R. Co., 17 Ohio, 157; Scarlett v. Academy of Music, 46 Md. 132; Cross v. Peach Bottom R. R. Co., 1 Am. & Eng. Cas. 336.

A subscriber to a railroad company is, of course, released from liability if the undertaking be not completed within the time specified by the charter, or if that portion of the subscription collected be refunded to some of the other subscribers. McCully v. Pittsburgh, etc., R. R. Co., 82 Pa. St. 25. He will also be released if the road be not completed within the time distinctly required by the terms of subscription. M. K. & C. R. R. Co. v. Thompson, 1 Am. & Eng. R. R. Cas. 381.

DERICK L. BOARDMAN et al., Executors, etc., Respondents,
v.

THE LAKE SHORE AND MICHIGAN SOUTHERN RY. CO., Appellant.

(84 New York Report, 157. March 1, 1881.)

Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears, before the holders of common stock are entitled to anything.

A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared.

When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration, the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets including all undeclared dividends.

While as a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion, where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action, and when necessary, to restrain, by injunction, any action adverse to such right.

A foreign corporation sued in this State cannot avail itself of the statute of limitations; and this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this State, and has property and officers therein.

In 1857 the M. S. & N. I. R. R. Co. issued certain preferred and guaranteed stock; the certificates therefor stated that the stock was entitled to annual dividends at the rate of ten per cent, payable semi-annually, at days specified, out of the net earnings of the company, and also to share pro rata with the other stock in any excess, and that the payment of the dividends was thereby guaranteed. Said company was consolidated with defendant, the latter assuming its obligations. No dividends were paid upon the said stock until 1863, and the arrears were not subsequently paid although dividends were declared and paid upon the common stock. In an action to compel the payment of the back dividends, for the purpose of showing authority for the issue of the stock, the book of minutes, containing certain resolutions of the board of directors of said M. S. & N. I. R. R. Co. authorizing the issue of the preferred guaranteed stock, was offered and received in evidence under the objection that the certificate was the contract and could not be varied by other evidence. *Held*, no error; that the whole proceeding relating to the issue of the stock could be taken in connection as constituting the one transaction.

The resolution of the directors declared that dividends on the stock authorized to be issued should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock. *Held*, that this was in effect the contract as expressed in the certificate; and that under it the dividends were not only preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, and in case of a failure in any year to earn profits sufficient to pay the dividends specified, they were to be paid as arrears before any dividends were paid upon the common stock.

There was no proof of plaintiffs' title to the preferred stock except the certificate issued to plaintiffs' testator. *Held*, that in the absence of proof of the issue of other stock of this description the presumption was that plaintiffs' stock was a portion of that so authorized to be issued, and that plaintiffs were the lawful owners.

Plaintiffs' testator did not become owner of the stock until 1863. *Held*, that the transfer to him carried with it all right to the unpaid dividends.

Hill v. The N. Co. (8 Hun, 459; affirmed, 71 N. Y. 593), distinguished.

The complaint asked and the judgment directed a specific performance of the contract and restrained defendant from paying dividends upon that portion of its common stock which represented the common stock of the M. S. & N. I. R. R. Co. until the amount of the arrears was paid. *Held*, no error; that plaintiff was entitled to the equitable relief granted.

Coe v. B. & C. D. R. R. Co. (3 Irish R. [C. L. S.] 119), distinguished.

Also, *held*, that an action was maintainable against defendant alone as the representative of the corporation with which the contract was made.

Also, *held*, that, as the claim was originally against a foreign corporation, and as the articles of consolidation by which defendant assumed the obligation took effect within six years of the commencement of the action, the statute of limitations did not run against plaintiffs' claim; also that as it did not appear that any action on the part of defendant was induced by the delay in prosecuting said claim, plaintiff was not estopped by such delay.

Kent v. Q. M. Co. (78 N. Y. 184), *Coles v. Bank of England* (10 Ad. & El. 437), *Pickard v. Sears* (6 id. 474), *Prendergast v. Turton* (1 Younge & Coll. 98), *Stafford v. Strofford* (1 De Gex & J. 193), *Nichols v. Gilson* (3 Atk. 573), *Currie v. Goold* (3 Mad. Ch. 426), *Matthews v. G. N. R. R. Co.* (5 Jurist [N. S.], Part 1, 284, 290) distinguished.

Defendant was organized as a corporation under the statutes of several States to operate a continuous line of road running through those States which had previously been operated by the consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining States, were repugnant to the provision of the U. S. Constitution (art. 1, § 8, sub. 3), conferring on Congress the power to regulate commerce with foreign nations and among the several States. *Held*, untenable; that in the absence of any legislation by Congress upon the subject, the power so to legislate existed in the States.

Also, *held*, that plaintiff was entitled to recover interest.

The rule laid down by the English authorities where interest upon annuities was refused, *held*, not to apply.

(Argued November 12, 1880; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 4, 1879, affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

This action was brought by George S. Boardman, plaintiffs' testator, in August, 1875, to compel defendant to pay dividends upon certain shares of preferred stock held by him and to restrain it from paying dividends upon certain portions of its common stock until the claim of plaintiff was paid and satisfied. The original plaintiff having died after trial and before the decision the present plaintiffs were substituted.

The facts found by the court are substantially as follows:

From and during the year 1857, until in or about the year 1869, the Michigan Southern and Northern Indiana R. R. Co. was a corporation created and existing under the laws of the respective States of Michigan, Ohio, Indiana and Illinois, and was the owner of and engaged in operating railroads lying in the said States. About the month of April, 1857, the said corporation having become indebted to a large amount, a plan was devised to raise funds by the issue of preferred stock. The plan was submitted for approval to the stockholders of the said corporation at their regular annual meeting in April, 1857, and thereupon the same was approved by a vote or resolution adopted unanimously. On or about the 5th day of May, 1857, the then board of directors of the said company duly voted to issue the said pre-

ferred stock, and for that purpose unanimously adopted a resolution as follows:

"Resolved, That for the purpose of providing means for the payment of the unfunded debts of this company and for the completion of its unfinished works, there be and there is hereby created a guaranteed and preferred stock of this company, to be denominated 'construction stock,' to the amount of \$3,000,000, which stock shall be entitled to dividends at the rate of ten per cent per annum, payable in cash semi-annually in New York, and in the payment of such dividends the said guaranteed stock shall have preference and priority over the remaining stock of the company, and dividends at the rate aforesaid shall always be paid upon said guaranteed stock out of any net earnings of the company before any portion of said net earnings shall be applied to the payment of dividends upon the remaining stock of the company; and in case the earnings of the road shall enable the company hereafter to pay dividends upon all of its stock at a rate exceeding ten per cent per annum, then such guaranteed stock shall be entitled to share pro rata with the other stock in such excess over ten per cent per annum. The first dividend on said stock will be payable the 1st day of December next, and thereafter on the 1st of June and 1st December in each year."

Notice was given to the public and to stockholders, and books of subscription were opened and the amount of stock offered was subscribed for and taken. The book of minutes containing those resolutions was received in evidence under objection and exception.

No dividend whatever was declared or paid by the company upon the said guaranteed or construction stock from the date of the issue thereof until on or about the 1st day of July, 1863, at or about which time the then directors of the said corporation declared and announced a dividend of five per cent on so much of said stock as was then outstanding, payable on the 1st day of August, 1863, for the six months prior to that date.

After that date, and down to the time of the consolidation hereinafter mentioned, the said company regularly earned, declared and paid the said percentage or dividend of five per cent for each successive period of six months upon said stock.

The company realized and accumulated surplus earnings over and above the dividends so paid, and its board of directors declared and announced a dividend of three and one-half per cent upon its common stock, payable August 1, 1864, which was paid, and also declared and paid a second dividend of like amount, payable March 1, 1865; said two dividends amounting to a sum sufficient, if applied for that purpose, to cancel and pay off the whole arrears of dividends upon the guaranteed or construction stock which was outstanding at the time of the commencement of this action. After the said 1st day of March, 1865,

other dividends were declared and paid by the said company upon the common stock.

On November 26, 1862, twenty-three shares of said preferred stock were assigned to plaintiff's testator, and a certificate of the said shares was contemporaneously with such sale delivered to him; such certificate being in the form adopted by the said board of directors, and which was printed in blank to be filled up in writing. The form of the certificate is as follows:

"Michigan Southern and Northern Indiana Railroad Company.

"Guaranteed ten per cent stock.

"This is to certify that.....entitled to.....shares of \$100 each in the capital stock of the Michigan Southern and Northern Indiana R. R. Co., denominated construction stock; said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York on the 1st days of June and December in each year, out of the net earnings of the said company; and is also entitled to share pro rata with the other stock of the company in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed. The said stock is transferable only on the books of the said company at their office in the city of New York by the said stockholder in person, or by....., attorney, on the surrender of this certificate.

"In witness whereof the said company have caused the same to be registered, and this certificate to be signed by their president and treasurer and countersigned by their secretary."

In or about the year 1869, pursuant to the provisions of certain acts of the legislatures of the States of Pennsylvania, Ohio, Michigan, Indiana and Illinois, the Michigan Southern and Northern Indiana R. R. Co., was merged and consolidated with the Lake Shore Ry. Co., which owned and operated a railroad extending from the city of Erie, in the said State of Pennsylvania, to the city of Toledo, in the said State of Ohio, and the consolidated company so formed took and assumed the name of the Lake Shore and Michigan Southern Ry. Co. Afterward, and pursuant to the provisions of the act of the legislature of the State of New York, entitled "An act authorizing the consolidation of certain railroad companies," passed May 20, 1869, and also pursuant to the provisions of certain laws of the said States of Pennsylvania, Ohio, Michigan, Indiana and Illinois, the Buffalo and Erie R. R. Co., a corporation created and existing under and by virtue of the laws of the States of New York and Pennsylvania, and which owned and operated a railroad extending from Buffalo to the eastern terminus of the line of railway of the Lake Shore and Michigan Southern Ry. Co. was merged and consolidated with the Lake Shore

and Michigan Southern Ry. Co. At the time of such consolidation the Buffalo and Erie R. R. Co. and the Lake Shore and Michigan Southern Ry. Co. owned and operated lines of railroad, which, taken together, formed a continuous line of railroad extending from the City of Buffalo to Chicago, in the said State of Illinois. The said company so formed by last-mentioned merger and consolidation assumed the name of and became and is known as the Lake Shore and Michigan Southern Ry. Co. which is the defendant in this action; the agreement for the merger and consolidation last mentioned was filed and recorded in the office of the Secretary of State of the State of New York on the 14th day of August, 1869.

By the provisions of the several statutes authorizing the consolidation, the rights of all the creditors of, and all the liens upon the property of the Michigan Southern and Northern Indiana R. R. Co. were to be and were preserved unimpaired; by the said agreement of consolidation all just debts, guarantees, liabilities and obligations existing against either of the said companies, parties to said agreement at the time of the taking effect of said consolidation, were assumed by the said consolidated company; and all contracts and agreements existing between either of the said parties to the said agreement of consolidation and other companies, or with any person or persons, were to be carried out and performed by the said consolidated company.

At the request of defendant's counsel the referee found the following additional facts: That plaintiff has received dividends semi-annually on said stock from and including August 1, 1863, until the trial of this cause; that the said Michigan Southern and Northern Indiana R. R. Co. had at all times, between April 1, 1857, and June, 1869 (the time when it consolidated with the Lake Shore Ry. Co.), an office and place of business in the city of New York, in the State of New York, and that during such period its president, treasurer, and a majority of its directors, resided in the State of New York; that it had and owned property in the State of New York at all times between April 1, 1857, and the time it consolidated as aforesaid; that the defendant had at all times since August, 1869, an office and place of business and property in the city of New York, in the State of New York, and that during such period its president, treasurer, and a majority of its directors resided within the State of New York; that the certificate of shares of stock, given in evidence by the said plaintiff, is the only proof of his ownership of or title to the stock upon which he seeks to recover dividends in this action; that no dividends were declared by the Michigan Southern and Northern Indiana R. R. Co. at any time prior to the dividend made payable August 1, 1863, on the stock in question; that the said company never at any time recognized any claim for back dividends on the stock in question as a debt or valid liability or obligation against it; that the said company did

not at any time after May, 1857, and prior to August 1, 1863 (the time when it paid its first dividend on this stock), realize or earn any moneys which should or ought to have been applied to the payment of dividends on the plaintiffs' or on any of the guaranteed or construction stock which was authorized to be issued by the said company as aforesaid.

Further facts appear in the opinion.

James Matthews and Edward S. Rapallo for appellant. The contract between the purchaser of the stock and the company is that contract contained in the wording of the certificate. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 180; *McCluskey v. Cromwell*, 41 id. 593, 601; *Wilson v. Dean*, 74 id. 531; *Henry v. The Great Northern Ry. Co.*, 3 Jur. [N. S.] part 1, 1137; *Taft v. The H. P. & F. R. R. Co.*, 8 R. I. 310; *Stevens v. The South Devon R. R. Co.*, 12 Eng. L. & Eq. 229; *Crawford v. The North-eastern Ry. Co.*, 3 Jur., part 1, 1093; *Sturges v. The East U. R. R.*, 31 Eng. L. & Eq. 406; *Miller v. Ill. Cent. R. R. Co.*, 24 Barb. 329; *Miller v. Travers*, 8 Bing. 244; *Sanderson v. Piper*, 5 Bing. N. C. 425; *Reed v. Prop. of Locks, etc.*, 8 How. [U. S.] 274; *Sargent v. Adams*, 3 Gray [Mass.], 72.) The court erred in finding as a fact that the shares of stock upon which the plaintiffs sue are a portion of the \$3,000,000 issue of 1857, upon which the non-payment of dividends has been proved, there being no evidence of the identity of the plaintiffs' stock with a part of the issue. (*Putnam v. Hubbel*, 42 N. Y. 106-112.) The court erred in giving plaintiffs judgment for the amount of dividends unpaid during the whole period from 1857 to 1863, in view of the fact that plaintiffs' testator did not become owner of the stock until 1862. (*Hyatt v. Allen*, 56 N. Y. 553; *LeRoy v. The Globe Ins. Co.*, 2 Edw. Ch. 656; *Hill v. Newechawanick Co.*, 8 Hun, 459; 71 N. Y. 593; *Jones v. Terre Haute*, 29 Barb. 353, and 57 N. Y. 196; *Van Wicklen v. Paulson*, 14 Barb. 654.) A court of equity possesses no general visitatorial powers over corporations, except such as are expressly conferred by statute. (*Latimer v. Eddy*, 46 Barb. 61; *Karnes v. Roch.*, etc., R. R., 4 Abb. [N. S.] 107; *Bangs v. McIntosh*, 23 Barb. 599; *Howe v. Dannel*, 43 id. 505; *Belmont v. Erie Ry. Co.*, 52 id. 666-8; *Atty. Gen. v. Bk. of Niagara*, Hopk. Oh. [2d ed.] 412; *State of La. v. Bk. of La.*, 6 La. 745; *Brown v. Monmouthshire Ry. Co.*, 4 Eng. L. & Eq. 118; *Jackson v. Newark R. R. Co.*, 2 Vroom [3 N. J.], 277; *Rex v. Bk. of Eng.*, 2 Barn. & Ald. 620; *Karnes v. Rochester & Gen.*, 4 Abb. [N. S.] 107; *Howe v. Peckham*, 6 How. Pr. 232; *Cropey v. Sweeney*, 27 Barb. 310; *Madison Ave. B. Church v. Same*, 26 How. Pr. 72; *Mutual Benefit Life Ins. Co. v. The Supervisors of N. Y.*, 32 id. 359; *Livingston v. Hollenbeck*, 4 Barb. 10; *Craig v. Hyde*, 24 id. 313; *Kempsall v. Stone*, 5 Johns. Oh. 193; *Hatch v. Cobb*, 4 id. 559; *Pfeer v. Kissam*, 3 Edw. Ch. 129.) The

consolidation, although made with the permission of the various States, constituted nothing more than a species of co-partnership of the various corporations, and this defendant is in the nature of a firm, and cannot be sued as one individual. (*Farnum v. The Blackstone Canal Co.*, 1 Sumner, 46; *Bk. of Augusta v. Earle*, 13 Peters, 588; *Ohio & Miss. R. Co. v. Wheeler*, 1 Black [U. S.], 295; *Racine & M. R. Co. v. Farmers' L. & Trust Co.*, 49 Ill. 331; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. [4 Otto] 444-7.) The plaintiffs are now precluded and estopped from recovering sums of money which should rightly be distributed as dividends, or go to the benefit of those who are now the common stockholders. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 184; *Coles v. The Bk. of Eng.*, 10 Ad. & Ellis, 437; *Richard v. Seares*, 6 id. 474; *Manufacturing Bk. v. Hazzard*, 30 N. Y. 226; *Prendergast v. Turton*, 1 Younge & Collyer, 98; *Nichols v. Leeson*, 3 Atk. 573; *Currie v. Goold*, 2 Mad. 163; *Matthews v. The Great Northern R. Co.*, 5 Jur. [N. S.], part 1, 284, 290; *Stafford v. Stafford*, 1 DeGex & Jones, 193.) The acts of the legislatures of the several States through which the railroads mentioned in the pleadings and proofs in this action run are, so far as they relate to, provide for, or authorize the consolidation of the railroads in the adjoining States, in violation of subdivision 3 of section 8 of article 1 of the Constitution of the United States. (*Munn v. Illinois*, 94 U. S. [4 Otto] 13.) The laches and acquiescence of plaintiff's testator operated as a bar to this action. (1 *Wait's Actions and Defenses*, 152, 153, 198.)

Lucien Birdseye for respondents. This action did not involve the internal affairs of a foreign corporation in any such way as to deprive the court of jurisdiction. (*Da Costa v. Jones*, Cow. 729.) The Michigan Southern and Northern Indiana R. R. Co. had lawful authority to issue the guaranteed stock in question, and to confer upon and attach to it the privileges claimed by the plaintiffs in this action. (*Prouty v. The M. S. & N. I. R. R. Co.*, 1 Hun, 663; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 181; *Davis v. Prop'rs of Meeting House in Lowell*, 8 Metc. 321; *Bates v. Androscoggin & Kennebeck R. R. Co.*, 49 Me. 491; *Rutland, etc., R. R. Co. v. Thrall*, 35 Vt. 536; *Williston v. M. S. & N. I. R. R. Co.*, 28 Penn. St. 321; *Lockhart v. Van Alstyne*, 31 Mich. 76; *McLaughlin v. Detroit, etc., R. R. Co.*, 8 id. 100; *Evansville, etc., R. R. Co. v. City of E.*, 15 Ind. 395; *Haselhurst v. Savannah R. R. Co.*, 43 Ga. 13; *Totten v. Tison*, 54 id. 139; *Kent v. Quicksilver Co.*, 12 Hun, 53; 78 N. Y. 159; *Howell v. Chicago & N. W. R. R. Co.*, 51 Barb. 378; *Bailey v. Hannibal & St. Joseph R. R. Co.*, 17 Wall. 97; 1 Dillon, 174; *Harrison v. Mexican R'y Co.*, 12 Eng. [Moak's Notes] 793; *Sturge v. Eastern Union R'y Co.*, 7 DeGex, McN. & G. 158; *Matthews v. Gt. N. R'y Co.*, 5 Jurist [N. S.], part 1, p. 284; *Corry v. Londonderry & En. R. R. Co.*, 29 Beav. 263; *Matter of Anglo-*

Danubian Steam Nav. Co., L. R., 20 Eq. 239; Matter of London India Rubber Co., L. R., 5 id. 519; Matter of Bangor, etc., Slab Co., L. R., 20 id. 59; S. C., 13 Eng. [Moak's Notes] 606; Matter of London Permanent Building Co., 17 Weekly, 513; affirmed, 21 L. T. [N. S.] 8; Redfield on Railways, § 237; Field on Corporations, 136; Green's Brice's Ultra Vires, 145.) The rights of the holders of this guaranteed stock against the corporation issuing it were created at the time of the creation of and agreement to issue the stock. (*Kortright v. Buffalo Com. Bk.*, 20 Wend. 91, 94; 22 id. 348; *Bank of Attica v. Manuf. & Traders' Bk.*, 20 N. Y. 501; *Ormsby v. Vt. Copper M. Co.*, 56 id. 623; *Hughes v. The Same*, 72 id. 207; *Presbyterian Congregation v. Carlisle Bk.*, 5 Barr. [Penn.] 345; *Slaymaker v. Bank of Gettysburg*, 10 id. 373; *Bates v. Androscoggin & Ken. R. R. Co.*, 49 Me. 491; *Davis v. Prop. of Meeting House in Lowell*, 8 Metc. 321; *Ellis v. Essex Merrimack Bridge Co.*, 2 Pick. 243; *Sargent v. Franklin Ins. Co.*, 8 id. 90, 98; *Field v. Pierce*, 102 Mass. 261; *Richardson v. Vt. & Mass. R. R. Co.*, 44 Vt. 613; *Bailey v. Hannibal & St. Joseph R. R. Co.*, 1 Dillon, 174; affirmed, 17 Wall. 96; *City of Ohio v. Cleve. & Toledo R. R. Co.*, 6 Ohio St. 489; *Pittsburg & C. R. R. Co. of Alleghany*, 63 Penn. St. 126; *Agricultural Bk. v. Burr*, 24 Me. 256; *Agricultural Bk. v. Wilson*, id. 273; *Chester Glass Co. v. Dewey*, 15 Mass. 93, 101; *Merchants' Bk. v. Cook*, 4 Pick. 405; *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Davis v. Bk. of England*, 2 Bing. 393; *Taylor v. Midland R. Co.*, 28 Beav. 287; *Soloman v. Bk. of England*, 14 Sim. 775; *Ashley v. Blackwell*, 2 Eden, 299; *Hoagland v. Bell*, 36 Barb. 57; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Mechanics' Bk. v. N. Y. & N. H. R. R. Co.*, 13 id. 599; *Ketchum v. Stevens*, 17 id. 499; *McCreedy v. Ramsay, Prest.*, 6 Duer, 574; *Stevens v. South Devon R. Co.*, 9 Hare, 313; S. C., 21 L. J. Ch. [N. S.] 316; 12 Eng. L. & Eq. 229; *Sturge v. Eastern Union R. Co.*, 7 De Gex, McN. & G. 158; S. C., 31 Eng. L. & Eq. 406; *Crawford v. N. E. R. Co.*, 3 Kay & J. 723; S. C., 3 Jurist [N. S.], part 1, p. 1093; *Henry v. Gt. N. R. Co.*, 3 Kay & J. 723; S. C., 3 Jurist [N. S.], part 1, p. 1117; S. C., 1 Kay & J. 1; 3 Jurist [N. S.], part 1, p. 1133; S. C., 1 De Gex & Jones, 606; *Matthews v. G. N. R. Co.*, 5 Jurist [N. S.], part 1, p. 284; *Corry v. Londonderry & E. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. Cas. 358; S. C., 13 Eng. R. 793 [Moak's Notes]; *Lockhart v. Van Alstyne*, 31 Mich. 76.) The annual reports of the M. S. & N. I. R. R. Co., and the annual reports of the defendant corporation were properly admitted in evidence. (*London, B'r & S. C. R. Co. v. Goodwin*, 3 Exch. 320; 6 Railway Cases, 177; *Phil., W. & B. R. R. v. Howard*, 13 How. [U. S.] 307; *Eastern Union R. Co. v. Cochrane*, 24 Eng. L. & Eq. 495; Ind., Cin. & Lafayette R. R. Co. v. Jones, 29 Ind. 465; C. C. & J. C. R. R. Co. v. Powell, 40 Ind. 374; *King v. Mothersell*, 1 Strange,

93, citing *Thetford's Case*, 12 Vin. Abr. 90, pl. 16; *King v. Martin*, 2 Camp. N. P. 100; *Bretton v. Cope*, *Peake's Cases*, 30; *Turnpike Co. v. McKean*, 10 Johns. 154; *Wood v. Jefferson Co. Bank*, 9 Cow. 194, 205; *Owings v. Speed*, 5 Wheat. 420, 423-4; *Baptist Church v. Mulford*, 3 Halst. 182; *Gray v. Turnpike Co.*, 4 Rand. 578; *Duke v. Cahawa Nav. Co.*, 10 Ala. 82; *Hall v. Carey*, 5 Ga. 239; *Ryder v. Alton & Sangamon R. R. Co.*, 13 Ill. [3 Peck.] 516; *Citizens' Passenger R. Co. v. City of Phila.*, 49 Penn. St. 251; *P. W. & B. R. R. Co. v. Howard*, 13 How. [U. S.] 307; *U. S. v. Gooding*, 12 Wheat. 460, 470; *American Fur Co. v. U. S.*, 2 Pet. 358, 364; *Franklin Bk. v. Steward*, 37 Me. 524; *Smith v. Palmer*, 6 Cush. 513, 520.) The dividends on the guaranteed stock in question are cumulative; that is, if not regularly paid from time to time, they accumulated as arrears, to be paid afterward, before any dividends were paid upon the common stock. (Lindley on Part. 655*; *Stevens v. South Devon R'y Co.*, 9 Hare, 313; 21 Alb. L. J. Rep. Ch. [N. S.] 816; 12 Eng. L. & Eq. 229 [S. C.]; *Sturge v. The East Union R'y Co.*, 7 De Gex, McN. & G. 158; S. C., 31 Eng. L. & Eq. 406; *Crawford v. The North-Eastern R'y Co.*, 3 Jur. [N. S.] part 1, p. 1093; S. C., 3 Kay & J. 723; *Henry v. Great N. R'y Co.*, 3 Jur. [N. S.], part 1, p. 1117; S. C., 1 Kay & J. 1; 3 Jur. [N. S.], part 1, p. 1133; S. C., 1 De Gex & Jones, 606; *Mathews v. The Gt. Northern R'y Co.*, 5 Jur. [N. S.], part 1, p. 234; *Corry v. The Londonderry & Enniskillen R. Co.*, 29 Beav. 263; *Coe v. Belfast & County Down R. Co.*, Irish Rep., 2 C. L. 112; *Smith v. Cork & Brandon R. Co.*, ubi supra; *Matter of London India Rubber Co.*, L. R., 5 Eq. Cas. 519; *Matter of Bangor & Port Madock Slate & Slab Co.*, L. R., 20 Eq. 59; *Melhado v. Hamilton*, 21 Wend. 619; *Williston v. M. S. & N. I. R. R. Co.*, 13 Allen, 400, 405; *Taft v. H. P. & F. R. R. Co.*, 8 R. I. 310, 334-5; *Prouty v. M. S. & N. I. R. R. Co.*, 1 Hun, 653; *Westchester & Phil. R. R. Co. v. Jackson*, 77 Penn. St. 321; *Totten v. Tyson*, 54 Ga. 139; *Lockhart v. Van Alstyne*, 31 Mich. 76-79, etc.; *McLaughlin v. Detroit & Mil. R. R. Co.*, 8 id. 100; *Jones v. Terre Haute & Rich'd R. R. Co.*, 57 N. Y. 196; *Hill v. Newichawanick Co.*, 8 Hun, 459; affirmed, 71 id. 593; *Rider v. Alton, etc.*, R. R. Co., 13 Ill. 516, 520; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Union B'k v. State*, 9 Yerg. 490; *Crawford v. North-east R. Co.*, 3 Kay & J. 723, 744; *Henry v. Gt. N. R. Co.*, 1 De G. & J. 616, 637; *State of Conn. v. Norwich & Worcester R. R. Co.*, 30 Conn. 290; *Everhart v. Westchester & Phil. R. R. Co.*, 28 Penn. St. 329; *Rutland & B. R. R. Co. v. Thrall*, 35 Vt. 536, 545; *Correy v. Londonderry & En. R. Co.*, 29 Beav. 263; *Smith v. Cork & Brandon R. Co.*, 5 Ir. Eq. 65; *Hutton v. Scarborough Cliff Hotel Co.*, 2 De & Sm. 574; 13 W. R. 631; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. C. 358; S. C., 12 Eng. 793 [Moak's Notes]; *St. John v. Erie R. Co.*,

10 Blatchf. C. C. 271; affirmed, 22 Wall. 136.) The right of the party suing for these arrears is not affected by the fact that he is a holder of the shares by purchase, nearer or more remote, instead of being the original subscriber for the stock, and the original holder of the certificate. (*Bagshaw v. Eastern Union R. Co.*, 7 Hare, 114; S. C., 13 Jur. 602; 27 Eng. Ch. 114; 2 McN. & G. 389; S. C., 2 Hall & Twell. 201; 14 Jur. 491; *Westchester & Phil. R. R. Co. v. Jackson*, 77 Penn. St. 321.) The objection that the consolidation of the railroad companies of different States to form the present defendant could only be effected or made under and by virtue of an act or acts of the Congress of the United States, and not of the different States thereof, is wholly untenable. (*Farnum v. Blackstone Canal Co.*, 1 Sumn. 48; *The Racine & Mississippi R. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331; 9 Am. L. Reg. 260; *P., W. & B. R. R. Co. v. Maryland*, 10 How. 376, 392; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 297; *Milnor v. The N. Y. & N. H. R. R. Co.*, 53 N. Y. 363; *Philadelphia, W. & B. R. R. Co. v. Maryland*, 10 How. 376, 392; *P., W. & B. R. Co. v. Howard*, 13 How. 307, 322, 323; *Clearwater v. Meredith*, 1 Wall. 25, 40; *Peck v. Chicago & N. W. R. R. Co.*, 4 Otto, 164; *Shields v. State of Ohio*, 26 Ohio St. 86; 5 Otto, 319; *State of Ohio v. Sherman*, 22 Ohio St. 411; *Prouty v. L. S. & M. S. R. Co.*, 52 N. Y. 363; *Matter of Sage*, etc., 70 id. 220; *Bishop v. Brainard*, 28 Conn. 289; *Platt v. N. Y. & Boston R. R. Co.*, 26 id. 514; 57 How. Pr. 26; *Sturges v. Crowninshield*, 4 Wheat. 122, 191; *Ogden v. Saunders*, 12 id. 213; 1 Kent's Com. 388. The statute of limitations does not bar the present action. (*Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Thompson v. Tioga R. R. Co.*, 36 Barb. 79; *Rathbun v. Northern Cent. R. Co.*, 50 N. Y. 656.) The case presented by the plaintiffs is one of equitable cognizance, and the plaintiffs' remedy is not merely at law. (*Stevenson v. Buxton*, 15 Abb. 352; *Coey v. Belfast & County Down R. Co.*, 1 R., 2 Ch. 112, 123.) The stockholder was entitled to interest on the dividends he was to have received; at least, from the time the net earnings began to be appropriated by the corporation to the payment of dividends to the holders of common stock. (1 Hun, 667; *Conn. Mut. F. Ins. Co. v. Cleveland*, etc., R. R. Co., 44 Barb. 9; *Hollingsworth v. City of Detroit*, 3 McLean, 472.) Every purchaser and holder of scrip for shares of the stock and of the shares evidenced thereby became entitled to and invested with all the rights, privileges and benefits attached thereto, or held or owned by the original subscribers for the stock, and all the intermediate holders, down to the time when the same became vested in such purchaser. (*Bagshaw v. East. Union R. Co.*, 2 McN. & Gor. 389; S. C., 2 Hall & Twell. 201; 14 Jurist, 491; 7 Hare, 114, and 27 Eng. Ch. 114; 13 Jur. 602; *Jones v. Terre Haute R. Co.*, 29 Barb.

353; *Phelps v. Farmers' Bk.*, 26 Conn. 269; *Westchester & Phil. R. R. Co. v. Jackson*, 77 Penn. St. 321; *Angell & Ames on Corporations* [10th ed.], § 567, note *a.*)

MILLER, J.—The plaintiffs seek by this action to compel the defendant to pay dividends of ten per cent per annum from June, 1857, to February, 1863, upon certain shares of stock owned by the plaintiffs' testator, which were issued as preferred and guaranteed stock by the Michigan Southern and Northern Indiana R. R. Co., in the year 1857. The issue of stock amounted to \$3,000,000 and the company failed to pay the dividends now sought to be recovered. The defendant, under acts of consolidation passed by the legislatures of the States through which the roads ran, assumed the debts and obligations of said company. The certificate of said stock issued by the company and stated as follows: "Said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York, on the first days of June and December in each year, out of the net earnings of the said company, and is also entitled to share pro rata with the other stock of the company in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed." At the top of the certificate after the designation of the name of the company, the number of scrip and the number of shares, was inserted the words, "guaranteed ten per cent stock." None of the dividends provided for were paid until 1863, when a dividend of five per cent, out of the net earnings of the previous six months, was for the first time declared, and no payment has been made upon the arrears of dividends which have accumulated upon said stock.

Objections were made upon the trial to the introduction of the book of minutes of the company, containing certain resolutions of the directors of the Michigan Southern and Northern Indiana R. R. Co., which authorized the issue of guaranteed stock of the company to be denominated "construction stock," and the payment of dividends upon the same at the rate of ten per cent per annum. The objection to these resolutions and proceedings is based mainly upon the ground that all proceedings prior to the issuing of the certificate became merged in the same, and such certificate became the contract between the company and the stockholders, which could not be varied by the other testimony. The resolution of the directors declared that the dividends at the rate named "shall always be paid upon said guaranteed stock out of any net earnings of the company, before any portion of said net earnings shall be applied to the payment of dividends upon the remaining stock of the company," and the book of minutes, containing this and other proceedings relating to the matter, was offered in evidence for the purpose of showing authority for the issue of the stock in question. Such

evidence is frequently resorted to in cases relating to the power to create preferred or guaranteed stock, or the right to receive dividends upon the same. (*Stephens v. South Devon R. R. Co.*, 9 Hare, 313; 21 L. J. Ch. Rep. [N. S.] 816; 12 Eng. L. & E. 229; *Sturge v. E. U. R. R. Co.*, 7 DeGex, McN. & G. 158; 31 Eng. L. & Eq. 406; *Crawford v. N. E. R. R. Co.*, 3 Jur. [N. S.] part 1, 1093; *Henry v. G. N. R. R. Co.*, id. 1117, 1133; *Matthaur v. G. N. E. R. R. Co.*, 5 id., part 1, 284; *Corey v. Londonderry & E. R. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. L. Co.*, L. R., 19 Eq. Cas. 358; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.) In the case last cited, the charter, by-law and resolutions of stockholders, and other evidence of a similar character, were received without any apparent objection, and are referred to in the opinion in connection with the certificate. The stock certificate, although on its face in due form, may be the subject of inquiry to ascertain whether it was fraudulently issued. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599.) In fact the certificate of itself is merely evidence tending to show the ownership of the shares. (*Bates v. A. & K. R. R. Co.*, 49 Me. 491.) The resolutions, the book of minutes, annual reports and other proceedings were competent, for the purpose of showing the real character of the transaction and as a part of the same.

The claim of the defendant is, that the certificate of itself did not give a preference, and that the guarantee only authorized the dividend described in the certificate, and that it was error to admit such evidence for the purpose of changing, varying or interpreting the contract. We think that the whole proceeding relating to the issue of the stock may be taken in connection as constituting one and an entire transaction. The resolutions were competent evidence to show authority to issue the stock; the proposal and other proceedings to carry out the purpose of the resolutions and the certificate as evidence of what stock was actually issued, and in part the terms upon which it was so issued. Altogether these papers evince what the intention was. Without the certificate, the shareholder would be entitled to the shares which had been paid for, and the dividends and the certificate did not circumscribe or limit his rights in this respect, but render them more definite and specific. We think, therefore, that the evidence objected to cannot be considered as extrinsic evidence to vary, modify or explain the written contract, or any uncertainty or ambiguity relating to such contract. We are referred by the appellant's counsel to several reported cases which uphold the doctrine that where there is an uncertainty of meaning upon the face of the contract, owing to its wording, and not to any collateral circumstances, other evidence is not competent. (See *Miller v. Travers*, 8 Bing. 244; *Sanderson v. Piper*, 5 Bing. N. C. 425; *Reed v. Proprietor of Locks*, 8 How. [U. S.] 274; *Sargent v. Adams*, 3 Gray, 72.) These decisions relate to the con-

struction of a particular instrument alone, and not to a case where stock is issued by a corporate body, and the circumstances, as well as the nature of the contract, and the acts and proceedings connected with such issue, are to be taken into consideration. The cases cited, therefore, are not analogous.

Assuming, however, that any doubt may arise as to the competency of the evidence, we are of the opinion that, from the language of the certificate and the guarantee, the plaintiffs were entitled to the dividends. By the certificate alone the intestate was entitled to dividends at the rate of ten per cent per annum, payable semi-annually out of the net earnings of the company, and it is agreed by the guarantee that these dividends shall be paid as provided. The contract is explicit as to the amount and the source out of which the dividends shall be paid, and the times when payable annually are also designated. The design evidently was that the stockholders should realize ten per cent each year, payable semi-annually upon the investment actually made. As they were entitled to receive such dividends from the net earnings and to have ten per cent upon the investment, and this was absolutely guaranteed, it necessarily follows that in the event that such earnings should not reach that amount or at any time failed, the dividends must afterward be paid from the net earnings when earned and received by the company. The reasonable and fair interpretation of the contract is, that the dividends are not only to be preferred, but, being guaranteed, were cumulative and a specific charge upon the accruing profits, to be paid as arrears, before any other dividends were divided upon the common stock. The doctrine that preference shareholders are entitled to be first paid the amount of dividends guaranteed, and of all arrears of dividends or interest before the other shareholders are entitled to receive anything, and although they can receive no profits where none are earned, yet as soon as there are any profits to divide they are entitled to the same, is fully supported by authority. In *Henry v. G. N. R. R. Co.*, 3 Jurist (N. S.), part 1, 1117, affirmed upon appeal, reported in 3 Jurist, 1133, the right of preference rather than that of guaranteed stockholders to dividends in arrears was involved, and it was held by the Vice-Chancellor that the company had no right to declare a dividend so as to affect the right of preference stockholders, and that they were entitled to their full dividend for the period which had elapsed since the last payment of dividend, before the ordinary stockholder can take any dividend whatever. Upon appeal the decision was affirmed, and it was held that preference shareholders had a right to dividends at the stipulated rate chargeable exclusively as profits, and payable before anything is divided among the common shareholders. The Lord Chancellor, Cranworth, says: "That if, on the declaration of a dividend, the

fund to be divided should be insufficient to satisfy the claims of the shareholders entitled to preference, those shareholders will be entitled to be paid in full out of all subsequent dividends before the ordinary shareholders can receive anything." In the case last cited there were four classes of preferred stock, and the same principle is involved as arises in the case at bar. In *Crawford v. N. E. R. R. Co.*, 3 Jurist (N. S.), part 1, 1093, preference dividends were held to be a charge upon the profits of the company for all time, to the extent of the preference dividend held out as payable on the preference shares. The condition here was, that the preference shares should be entitled to a certain rate per annum for the periods named, and in part in perpetuity thereafter on the amount actually paid in. It was said that the words "interest" and "dividends" should be treated as synonymous. See, also, *Sturge v. E. N. R. R. Co.* (31 Eng. L. & Eq. 406), which decides that the holders of preference shares are entitled to be paid the amount of arrears out of any money belonging to the company applicable to such payment, before any payment shall be made by the company, to the ordinary shareholders in respect to dividends or interest. It is claimed that in the last two cases it was held that the preference dividends were a charge, because the contract was not for the payment of dividends at fixed times, but because the dividends were payable out of the revenues of the company at any time; but we think that those decisions were not made upon any such ground, but upon the principle that preference dividends must be paid before any others, which is well established and supported by the cases cited, as well as numerous other authorities. (See *Lindley on Part.* [4th ed.] 796, 798; *Stevens v. South Devon R. R. Co.*, 9 Hare, 313; 12 Eng. L. & Eq. 229; *Matthews v. G. N. R. R. Co.*, 5 Jurist [N. S.], part 1, 284; *Cory v. L. & E. R. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. R. Co.*, 19 Eq. Cas. 358.)

Even if there was a variation, as claimed, we are unable to perceive how this can make any difference; for, as we have seen, the stock being both preferred and guaranteed, the inference to be drawn from the nature of the obligation is certainly very strong upon the certificate itself, and, we may add, conclusive that a specific sum should be paid as dividends out of the net earnings every year, and, if there were none, as soon as received, as was the evident design of the issue of stock.

The position of the defendant's counsel, that the clauses in the certificate as to the net earnings and the time when the dividends are to be paid limit the contract, and that the holder is only entitled to dividends "out of the net earnings, if there are any at the times specified for the payment of the dividends, and if not, he is not entitled to any," therefore, would be adverse to the obvious design of the company in the issue of the preferred stock,

and cannot, we think, be maintained. The statement of the days when the dividends shall be payable was not the essence of the contract, but merely the designation of times when the owner had the right to receive the dividend. The substance and effect of the language employed is that these dividends should be paid out of the net earnings at a certain rate per annum, and the times designated for such payment were merely named to carry out the purpose of paying annual dividends. If no times had been designated, the right to the dividends would have been clear and unquestionable out of the net proceeds, within the cases relied upon by the respondent's counsel, and it does not affect, impair or destroy that right, because the days were especially enumerated. The guarantee in the certificate is also entitled to great weight in the interpretation of the contract and may fairly be construed as an agreement that the dividends shall be paid out of the net earnings which are made chargeable, and the guarantee is an engagement that they shall be applied for a particular purpose, in preference to or priority over common and less favored stockholders. (*Williston v. M. S. & N. I. R. R. Co.*, 13 Allen, 404.) We think it is quite obvious that the rights of the plaintiffs do not rest upon the certificate alone, and the resolution cited must be considered as a part of the arrangement, and having this in view, it is beyond any question that the preferred stockholder was entitled to dividends out of any net earnings of the company before the payment of dividends to the common stockholder.

The finding that the shares of stock upon which the plaintiffs sue were a portion of the three million issue of 1857, upon which no dividends had been paid, is, we think, supported by the testimony. The judge found that the certificate was the only proof of plaintiff's ownership of a title to the stock, and there was no proof of the circumstances under which the plaintiff became owner, except the certificate from whence he derived title. The plaintiff proved that he held a certificate of the stock; that dividends were not paid, and as the certificate shows, that the stock was to pay a dividend of ten per cent, and there is no proof of any other stock of this description, every presumption is favorable to the theory that the stock was a part of the three million, and that the plaintiff was the lawful owner of the same.

There is, we think, no valid ground for the position of the counsel for the appellant, that the court erred in giving the plaintiffs judgment for the amount of dividends unpaid during the intervening period from 1857 to 1863, in view of the fact that the plaintiffs' testator did not become owner of the stock until 1862, and the findings upon which the judgment was based. The rule is, no doubt, that a shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made or a dividend declared. When this is done, the dividend be-

longs to the owner of the share at the time, and until the dividend is declared, it is a portion of the assets of the corporation, and an assignment of the stock carries with it its proportionate share of such assets, which necessarily include as an incident all undeclared dividends. These are the subject of assignment, and pass with the transfer of the stock as a portion of the capital of the company. (*Hyatt v. Allen*, 56 N. Y. 553.) It follows that upon the transfer of the stock of the plaintiffs' testator to him, the assignment carried with it all right to the earnings or profits or claims to dividends, which ordinarily and lawfully was embraced within the scope of such a transfer, unless the facts accompanying the transfer render the case at bar an exceptional one and not within the general rule. Such is urged to be the fact by the appellant's counsel, and it is insisted that the company made a contract to pay certain dividends upon a contingency, which was the acquisition of net earnings by the company, and the right only becomes complete upon the happening of such contingency, and that the holder of the stock with whom the contract was made would become a creditor upon the acquisition of such net earnings, and that the plaintiffs cannot claim these dividends in their capacity as stockholders, for they have never been declared but only in the capacity of one who has made a contract with a corporate body. We are unable to perceive the force of this position, for conceding that the right of the plaintiffs depends upon a contract, that contract is connected with, relates to, and constitutes an integral part of the plaintiffs' right as a stockholder. It cannot be separated from the rights accruing by virtue of the stock which the plaintiffs hold; and being thus a part and parcel of the same, it passes with the transfer as one of its incidents, and as composing an essential element thereof.

A sale or assignment of the stock transferred by the operation of law all benefits to be derived from the same, and all profits, income or dividends or right to dividends by contract, which formed a constituent, valuable and an inseparable portion of the stock. When the contingency happened specified in the contract, the right to dividends became fixed, and existed independent of any act of the corporation or its officers. It became absolute and perfect in the stockholder without a declaration to that effect, and passed as an incident of the stock upon the transfer.

The dividends were not a chose in action arising from the contract, which could only be derived by a separate assignment, and no such instrument was required to convey or transfer a right to the same. Although usually there is no special contract of the company with the holders of the stock to declare dividends, yet that does not alter or change the effect of the contract by which the plaintiffs hold their stock and become entitled to dividends thereon; for in both cases the dividends follow the stock itself and belong to the owner.

We think it cannot be maintained, upon any sound principle, that the contract for the payment of dividends continues to each stockholder only during the time he holds the stock and accrues only to his benefit during that period, and that a separate and distinct assignment of the dividends was essential in order to confer title upon the owner. Such a conclusion is adverse to the general rule which is upheld by authority, that a transfer of stock of a corporation carries with it to the transferee its proportionate share of the assets of the company, including dividends which have not been declared, and all the incidents and advantages which appertain to the rights of a shareholder. The case of *Hill v. The Newitchawan Co.* (8 Hun, 459), affirmed in this court in 71 N. Y. 593, on appeal, which is relied upon by the appellant's counsel, is not analogous, as the dividend of previous earnings had virtually been declared before the sale, although the time of payment was not fixed, but was left discretionary with the agent. A distinction is recognized in the opinion between a dividend already declared, payable at a future day, and a division of future earnings; and it was properly held that the former owner, and not the purchaser, was entitled to the dividend.

We think there was no error in the judgment of the trial court because it decrees specific performance and grants equitable relief. The cause of action is of an equitable character, and the remedy demanded cannot be obtained by an action at law. It is not to recover the dividends alone, but to compel the defendant to do what is necessary and proper for the specific performance of the contract and agreement entered into by the Michigan Southern and Northern Indiana R. R. Co., in reference to the guaranteed or construction stock issued by it. The plaintiffs pray that an account be taken, that the defendant be compelled specifically to perform the agreement and enjoined from declaring or paying any dividends upon the common or unpreferred stock of the corporation, until the holders of the guaranteed or construction stock are all paid. Without some action of the officers of the corporation, there is no power to pay the dividends; and as they are to be paid out of the net earnings, this cannot be attained in any other manner.

The English cases already cited (*supra*), where the Court of Chancery interfered to restrain the payment of dividends to shareholders of a lower class until the arrears due those of a higher were paid, were all equitable actions. In the only case excepted from this general rule, the right of recovery depended upon an act of Parliament, and there had been an appropriation of the money. *Coey v. Belfast and County Down R. R. Co.*, 2 Irish (C. L. S.), 112.

While, as a general rule, courts of equity will not exercise visitatorial powers over corporations, and its officers are the sole judges as to the propriety of declaring dividends, and in this respect the court will

not interfere with a proper exercise of their discretion, yet where the right to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be asserted by a suit at law, and a restraint by injunction is essential to maintain the right of the stockholder, the interposition of a court of equity is a proper exercise of its power and should be upheld. In such a case the remedy at law is inadequate, and a court of equity alone can grant the proper relief. In regard to the controversy involved in this action, it is apparent that it is not one of legal cognizance, and a perfect remedy can only be obtained by an equitable action. The judgment here requires a specific performance of the contract, and such relief could not be obtained by an action to recover the dividends.

We are also of the opinion that the liability of the defendant, as the representative of the consolidated corporation and as a corporate body, is sufficiently established, and that it cannot be claimed that the defendant is in the nature of a firm and cannot be sued alone. Upon the trial, it was admitted that the defendant was a corporation duly created and organized as a corporate body, under the laws of several States, and when the defendant's corporation was formed, the several corporations, which were consolidated to form the defendant, owned and operated one continuous line of railroad running through the several States named; and that the defendant would not question its own corporate existence or that of the several corporations from which it was formed. The defendant is a corporation *de facto*. It filed its agreement and acts of consolidation with the secretary of State, a copy of which, duly certified, is made evidence in all courts (Laws of 1869, chapter 917, § 2, subd. 2), and was introduced in evidence upon the trial, as well as the laws of other States, and those together appear to establish sufficiently the existence of defendant *de jure* as a corporate body. It is also recognized as a corporation in several of the decisions of this court, and the validity of the consolidation is considered and affirmed. It is held that where two railroads are consolidated, as far as one of the creditors of one of the original companies is concerned, the consolidated company is the successor of the old company; but in respect to the properties of the other companies it is a new and independent company, and such creditor has no claim against it upon their original contract, but only by virtue of its assumption of the obligations of the old companies. (*Prouty v. L. S. and M. S. R. R. Co.*, 52 N. Y. 368.) The distinct point was taken, in the case last cited, that the consolidation was not a surrender of personal identity or corporate existence by either of the corporations. (See, also, *Chase v. Vanderbilt*, 62 N. Y. 307; in the *Matter of Sage*, 70 id. 220.)

We have carefully examined the cases cited to sustain the position contended for, but none of them present the characteristic fea-

tures which distinguish the case at bar, or hold that under the facts and circumstances presented upon the trial of this action the defendant could not be sued as a single corporation, and is not liable as such. Nor are we able to discover any effect of the principle laid down which is not the legitimate result and the necessary consequence of the arrangement under which the consolidation of the various corporations was accomplished and became merged in the defendant. The effect of the consolidation evidently was that the preferred stock should constitute a part of the liability, and no reason exists why the stockholders should be compelled to prosecute their remedy against one of the corporations alone with whom the contract was originally made.

The claim that the plaintiffs have been guilty of negligence and laches in asserting their right, and have so long acquiesced in the manner of distributing the funds and property of the company that it is too late to complain, and that the doctrine of an estoppel in pais applies, demands serious consideration. The question is whether the delay in bringing the action precludes a recovery under the circumstances presented. The defendant's obligation arises upon a contract, and the right to the dividends became fixed thereby, the same as the payment of any other demand which is provided for by the terms of an agreement. The failure to pay makes the right of action perfect, and under ordinary circumstances this can only be defeated by the statute of limitations. But was there such an acquiescence in the acts of the defendant, such laches and failure to proceed and claim the dividends by the plaintiffs or their testator, as in any way operated upon or induced the defendant to act differently from what it otherwise would have done, or as injured or affected its interests? The principle applicable to such case is laid down by Lord Denman in *Pickard v. Sears* (6 Ad. & El. 474), as follows: "The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Nor is it essential to an equitable estoppel that the party should design to mislead, and it is sufficient if his acts were calculated to mislead and have misled another acting upon it in good faith and exercising reasonable care. (*Manuf. Bank v. Hazzard*, 30 N. Y. 226). Within the rule stated, can it be said that the defendant was misled by the conduct of the plaintiffs, and that thereby it was induced to act differently than it otherwise would have done, or to change its former position? A recurrence to the facts disclosed upon the trial evinces that the action of the defendant was not based at all upon the apparent acquiescence of the plaintiffs in its neglect to pay the dividends. It appears that there has been, ever since the expiration of the time

when the dividends were due, an active and continuous litigation, and a sharp controversy in the courts with other parties against the old corporation and the defendant by stockholders who are similarly situated with the plaintiffs, to recover dividends upon the preferred stock. Some of the annual reports introduced in evidence upon the trial contain references to the pendency of these actions for the arrears of dividends, and show clearly and beyond any controversy that the defendant was well-advised and had full knowledge of the claim of the preferred stockholders. The pleadings, affidavit for injunction, and the injunction issued in one of the suits brought, in which the defendant was restrained from receiving funds from the old corporation and otherwise enjoined, which was also proved, show conclusively the existence of these litigations and bring the knowledge of the same directly to the defendant's officers. The defendant necessarily was acquainted with the character of the litigation, with the questions involved and the claim of the preferred stockholders to the dividends; and in the face of these facts, with full notice of the nature of the claim, has no ground for insisting that it would have acted otherwise if the plaintiffs had sued at an early day. It was not required that each particular stockholder should sue for his share of the dividends to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that it was advised of the character of the claim of the respective stockholders. The plaintiffs and other stockholders were entirely justified in awaiting the result of suits pending without incurring the hazard of losing their rights on account of the lateness of their demand. A right of action existed in favor of the stockholders against the corporation, which continues against the defendant, who has assumed and is bound to pay its debts and obligations, which right has not been lost by delay, acquiescence or laches. The defendant has in fact acted without regard to these stockholders' interests and diverted funds to which the plaintiffs were entitled, with full knowledge of the facts and without being misled or deceived by any misconduct or any want of action on their part. The doctrine of estoppel or of acquiescence has no application in such a case, and cannot be invoked to aid the defendant. The elements of an estoppel are wanting, as there has been no mistake or misleading, nor any injury arising from the delay in bringing an action. It cannot be urged upon any valid ground that the conduct of the defendant in reference to these dividends was in any respect influenced or affected by the plaintiff's delay to sue, or that it labored under any misapprehension, or was ignorant of or had not complete knowledge of the nature of the plaintiffs' claim.

We have examined the cases cited in this connection by the appellant's counsel, and none of them sustain the position that where the circumstances indicate a full knowledge of the facts in regard

to a claim which may be made, and where the party was advised, by the presentation of claims of other parties of a like character, which were the subject of litigation, that the doctrine of laches and acquiescence can be invoked as a defence. In each of these decisions there was strong and direct evidence to establish acquiescence in the action which had been taken, and the parties were suffered to proceed without notice, so as to warrant the conclusion that the subsequent claimants assented to what was done, and thus ratified the action taken. (See *Kent v. Quicksilver Mining Co.*, 78 N. Y. 184; *Coles v. Bank of England*, 10 Ad. & El. 437; *Pickard v. Sears*, supra; *Prendergast v. Turton*, 1 Younge & Col. 98; *Stafford v. Stafford*, 1 DeG. & J. 193; *Nicholas v. Leeson*, 3 Atk. 573; *Currie v. Goold*, 2 Mad. Ch. 426; *Matthews v. G. N. R. R. Co.*, 5 Jurist [N. S.], part 1, 284, 290.) We do not deem it necessary to consider these cases more fully, and it will be found that none of them are adverse to the views we have expressed.

We are also of opinion that the plaintiff's demand is not barred by the statute of limitations. The claim arose originally against a foreign corporation, and the action is based upon the assumption by the defendant of its debts and liabilities under the articles of consolidation, which, by an act of the Legislature, and the filing of the articles in the office of the Secretary of State, took effect in 1869. A foreign corporation sued in this State cannot avail itself of the statute of limitations. (*Olcott v. The Tioga R. R. Co.*, 20 N. Y. 210; *Thompson v. The Tioga R. R. Co.*, 36 Barb. 79.) And this rule obtains, although it has before the commencement of the action for the time specified in the statute continuously operated and carried on a railroad in this State, and has property and officers therein. (*Rathbun v. N. C. R. R. Co.*, 50 N. Y. 656). The statutory time for bringing the suit, if it can be regarded as in any sense applicable, would not begin to run until the date of the consolidation, and the action was brought within six years after that period.

There is, we think, no force in the position that the acts of the legislatures of the several States through which the railroads run, so far as they relate to or authorize the consolidation in the adjoining States, are in violation of subdivision 3 of section 8 of the first article of the Constitution of the United States, which confers upon Congress the power to "regulate commerce with foreign nations and among the several States." It is not claimed that Congress has legislated in respect to the subject, or assumed to exercise the power conferred by the Constitution, and it has not yet been decided that the provision cited requires that the power conferred should be exercised by Congress alone, and is taken away entirely from the control of the State legislatures. The conclusion, therefore, is inevitable that in the absence of such legislation by Congress, the power exists in the State to legislate upon the subject.

It is not the power itself, but its exercise, which is inconsistent with the exercise of the same power by the State legislature. It is the establishment of such laws by Congress as are inconsistent with the laws of the State, and not the right to establish a uniform system. While, then, Congress has the power to establish uniform laws on the subject of bankruptcy, this does not exclude the right of the State to legislate on the subject, except where the power is actually exercised by Congress and the State laws conflict with those of Congress. (*Ogden v. Saunders*, 12 Wheat. 213; *Sturges v. Crowninshield*, 4 id. 122, 191; 1 Kent's Com. 388.) The same rule applies to the legislation which has been considered. The case of *Munn v. Illinois* (94 U. S. 113) is cited by the appellant's counsel; and it is there held where warehouses are situated within a State, it may prescribe regulations for them, notwithstanding they are used as instruments by those engaged in inter-State, as well as in State commerce; and until Congress acts in reference to their inter-State relations, such regulations may be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction; and such a law is not repugnant to the Constitution. We are unable to discover anything in the case cited which conflicts with the right of the States to pass the laws referred to in regard to the consolidation of the railroads in question, and within this decision, as well as the authorities cited, we are brought to the conclusion that the acts in question were constitutional and valid.

We have examined the various objections taken to the findings and the refusals to find, and the rulings in regard to the evidence upon the trial, and none of the decisions of the court were erroneous in respect to the same. The motion to dismiss the complaint and for judgment was also properly denied. Nor was there any error in the allowance of interest upon the dividends.

The judgment should be affirmed.

All concur, except RAPALLO and ANDREWS, JJ., taking no part. Judgment affirmed.

Upon a motion for a reargument in this and other similar cases decided with it, the following opinion was handed down.

MILLER, J.—The motion for a reargument in these cases is founded upon the ground that the appellant's counsel omitted to discuss the question as to the legality of allowing interest upon the dividends, and that several decisions and authorities upon that question were not cited upon the brief of the appellant's counsel and the attention of the court was not drawn to the same. The position of the defendant's counsel is, that the ten per cent dividends which were to be paid by the contract and certificate upon the new stock issued were in the nature of interest and given as an inducement to the parties subscribing to advance this necessary amount of money to pay certain obligations of the corporation in a period of emergency

and that the allowance of interest thereon in point of fact would be interest upon interest, or compound interest which is unauthorized by law, and which is never allowed except in case of an express agreement to that effect. The general rule is well established that compound interest cannot be recovered by law without an agreement to pay the same entered into after it has become due. (*State of Connecticut v. Jackson*, 1 Johns. Ch. 13; *Ackerman v. Emmott*, 4 Barb. 649.)

Under ordinary circumstances interest is not recoverable upon dividends declared without a previous demand and a refusal to pay, and the question arises whether the rule stated is applicable under the state of facts presented in the case at bar. Under the resolutions of the stockholders and board of directors of the Michigan Southern and Northern Indiana R. R. Co. the stock proposed to be issued was to be guaranteed and preferred, and certificates were issued to that effect, by which the dividends were to be paid semi-annually out of the net earnings of the company before any portion should be applied to the payment of dividends upon the remaining stock. Upon the 28th of February, 1865, the guaranteed stock had been reduced by purchase, cancellation and otherwise and a surplus remained of \$743,000, which could have been applied to the payment of the arrears of the dividends of the stock in question, including that of the plaintiff. On the 1st of August, 1864, the directors in open violation of their agreement declared and paid a dividend upon the common stock of \$277,664.20, and in March, 1865, a like dividend. These amounts were sufficient to pay all arrears of dividends on guaranteed stock which were outstanding at the time this action was brought. Other sums were afterward paid for dividends upon the common stock in violation of the rights of the holders of guaranteed and preferred stock. These moneys, which should have been appropriated to the payment of the dividends due the preferred stockholders, were thus unlawfully diverted from that purpose. The security taken for the money advanced was not in the nature of an obligation for the repayment of money alone, nor the benefits or payments to be derived therefrom were not in substance or in effect interest upon money loaned merely, and therefore did not bear the character of ordinary obligations where the allowance of interest would be compounding the same, which the courts have regarded with disfavor and as unauthorized. The preferred stockholders merely obtained thereby an interest in the assets of the company which entitled them to the ordinary dividends the same as the common stockholders. The agreement to pay preferred or guaranteed dividends was an inducement to take the stock, and the dividends provided for were the only return for the moneys advanced. The security therefore taken differs from an annuity or ordinary dividend or an agreement to pay interest. This rule should more especially pre-

vail where the sums to be paid were allowed only from time to time out of the net earnings which ought to have been applied and were wrongfully appropriated to the payment of dividends to the common stockholders who were not entitled to the same before the others were paid. By this illegal appropriation the common stockholders received dividends and if they chose could have invested the same and thus drawn interest thereon, while the preferred stockholders have no such advantage. Having thus misappropriated the funds out of which the interest was to be paid to the preferred stockholders, the company should be compelled to pay interest on the sums which their own act prevented from being paid. They refused to fulfil the contract or to do what was required by law to pay the plaintiff the dividend to which he was entitled, and compelled him to bring an action to enforce the declaration of dividends and under these circumstances have no claim to be exempted from the payment of interest as damages as a consequence of their failure to perform a plain obligation. The plaintiff became damaged by the refusal of the company to declare a dividend when they had funds for that purpose and by the diversion of such funds his right to interest accrued by being compelled to institute an action to enforce the same. It may also be remarked that there were no specific dividends to demand until they had been declared, and hence the demand would have been unavailable and the case differs entirely from one where dividends have been declared or an annuity has been received or where money has been appropriated or received for such a purpose and nothing remains to be done except to pay it over when demanded by the person who is entitled to receive the same. Nor does it interfere with the right of the plaintiff to interest on dividends because this is an equitable action, for as no dividends had been declared and the plaintiff's remedy in part was to compel the officers of the company to declare such dividends, no other action could properly be brought in which adequate relief could be obtained. It is enough, we think, that the plaintiff's right to the interest exists to authorize the court to enforce his claim in this action.

The plaintiff's case bears no analogy to that of copartnerships when one of the partners is not entitled to interest as against the others. Nor is there any such laches in enforcing the plaintiff's demand, or by a failure to make a demand, or by bringing a suit at an earlier period as estops him from claiming such interest.

The learned counsel for the appellant has cited several English authorities where the courts have refused to allow interest to annuitants upon the arrears of an annuity, although there were circumstances which before induced the courts to allow it. (*Aylmer v. Aylmer*, 1 Malloy, 87; *Anderson v. Dwyer*, 1 Schoales & Lefroy, 301; *Booth v. Lycester*, 3 Mylne & Craig, 459; *Earl of Mansfield v. Ogle*, 4 DeG. & J. 38; *Torre v. Brown*, 5 House of Lords Cases,

part 1, 555; *Booth v. Coulton*, 7 Jurist [N. S.], part 1, 207; *Jenkins v. Bryant*, 16 Simons, 272.) We have given to these cases the most careful consideration, and they appear to establish a practice in the English courts to refuse interest upon annuities except under special circumstances, and one of these (3 Mylne & Craig, 459) appears to have been decided upon a question of intention. The rule seems to have been of modern origin, for the earlier cases are not entirely in the same direction. (*Litton v. Litton*, 1 P. Wins. 541; *Ferrers v. Ferrers*, Talbot's Cases, 2; *Robinson v. Cumming*, 2 Atk. 579; *Drapers' Co. v. Davis*, id. 211; *Morris v. Dillingham*, 2 Ves. Sr. 170; *Morgan v. Morgan*, 2 Dick. 643.) Assuming, however, that the modern decisions are controlling, cases of this kind are not in point when the claim to interest rests upon an unlawful appropriation of moneys which were properly applicable to the payment of arrears of dividends as is the case here. And where the party who is bound to pay is in fault and diverts or fails to apply the money in his hands for the purpose of paying dividends which are legally due, the rule laid down as to annuitants cannot shield it from the consequences of the default. Such party is not exonerated for the apparent reason that he was lawfully bound to pay and could pay, had he chosen to do so, and utterly failed and neglected to perform this conceded duty and obligation.

For the reasons stated, without considering the question as to the right to a reargument, we are of the opinion that the motion should be denied.

All concur.

Motion denied

Evidence.—What is evidence of the contract between shareholders and the company in which they hold stock?

Special committee contracts of subscription between the company and the subscriber are admissible. *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395. See also *Phoenix W. Co. v. Badger*, 67 N. Y. 294. A receipt by the treasurer of a company for money paid in advance for stock to be issued is admissible. *Miller v. I. C. R. R. Co.*, 34 Barb. 312. So also is a trust deed to secure preferred stock. *Bailey v. Hannibal and St. Jo. R. Co.*, 1 Dill. 174; S. C., 17 Wall. 96. See this case also as to the admissibility of a plan submitted in a circular to bondholders and relating to a proposed new issue of stock. Stock subscription and transfer books of the company are admissible. *Agricultural Bank v. Wilson*, 24 Me. 273; *Same v. Burr*, 24 Me. 256; *Phoenix W. Co. v. Badger*, 67 N. Y. 294; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 11 N. Y. 599; *Turnbull v. Payson*, 95 U. S. 418; *Hogland v. Bell*, 36 Barb. 57; *Plank Road v. Rice*, 7 Barb. 162; *Turnpike Road v. Van Ness*, 2 Cranch C. C. 451; *Mudge v. Howell*, 33 Cal. 25; *Coffin v. Collins*, 17 Me. 440; *Merrill v. Walker*, 24 Me. 237; *Partridge v. Badger*, 25 Barb. 146; *Corse v. Sandford*, 14 Iowa, 235. Provisions relating to stock in statutes or in the company's charter are essentially of the contract. *Sturge v. Eastern N. R. Co.*, 31 Eng. L. & Eq. 405; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 11 N. Y. 599; *Davis v. Proprietors*, 8 Metc. (Mass.) 321; *Stevens v. South Devon R. R. Co.*, 12 Eng. L. & Eq. 229; *Crawford v. North-eastern R. R. Co.*, 3 Jur. N. S. pt. 1, 1093; *Henry v. Great Northern R. R.*

Co., 3 Jur. N. S. 1137. By-laws and resolutions of directors and stockholders with regard to stock are admissible. *Kent v. Quicksilver M. Co.*, 78 N. Y. 179; *Henry v. Great North. R. R. Co.*, 3 Jur. N. S. 1137; *Stevens v. South Devon R. R. Co.*, 12 Eng. L. & Eq. 229; *Crawford v. Northeastern R. R. Co.*, 3 Jur. N. S. pt. 1. 1093; *City of Ohio v. C. & T. R. R. Co.*, 6 Ohio St. 489; *Bank of Attica v. Manufacturers'*, etc., Bank, 20 N. Y. 501; *Bates v. A. & K. R. Co.*, 49 Me. 491; *Field v. Pierce*, 102 Mass. 253; *Richardson v. Railroad Co.*, 44 Vt. 613. Certificates of stock are admissible. *Bailey v. H. & St. J. R. R. Co.*, 1 Dill. 174; *S. C.*, 17 Wall. 96; *Sturge v. Eastern N. R. R. Co.*, 31 Eng. L. & Eq. 405; *Mechanics' Bank v. New York, etc.*, R. R. Co., 11 N. Y. 599; *Merchants' Bank v. Cook*, 4 Pick. 405; *Field v. Pierce*, 102 Mass. 253; *Ellis v. Proprietors*, 2 Pick. 243; *Hughes v. Vt. C., P., M. Co.*, 72 N. Y. 207; *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. St. 345; *Slaymaker v. Bank*, 10 Pa. St. 373; *City of Ohio v. C. & S. R. R. Co.*, 6 Ohio St. 489; *P. & C. R. Co. v. County of Alleghany*, 63 Pa. St. 126; *Agricultural Bank v. Wilson*, 24 Me. 273; *Same v. Burr*, 24 Me. 256; *Crawford v. N. E. R. R. Co.*, 3 Jur. N. S. pt. 1, 1093; *Kent v. Quicksilver M. Co.*, 78 N. Y. 180; *Henry v. Great North. R. Co.*, 3 Jur. N. S. 1137. Books of minutes and records of the proceedings of the company are admissible. *Stevens v. South Devon R. R. Co.*, 9 Hare Ch. 313; *Sturge v. Eastern N. R. R. Co.*, 7 DeG., McN. & G. 158; *Crawford v. N. E. R. Co.*, 3 Jur. N. S. pt. 1, 1093; *Henry v. Great North. R. R. Co.*, 3 Jur. N. S. pt. 1, 1117, 1133; *Corey v. Londonderry & E. R. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. L. Co.*, 19 Eq. Cas. 358; *Kent v. Quicksilver M. Co.*, 78 N. Y. 159. And in the absence of any statute requiring written evidence a witness having personal knowledge thereof may testify who were stockholders at a given time. *Tyng v. U. S. Submarine, etc., Co.*, 1 Hun, 161.

Preferred stock.—Express authority in the charter must precede the issuance of preferred stock. *Smith v. Goldworthy*, 4 Q. B. 430; *Droitwich Salt Co. v. Curzon*, L. R. 8 Ex. Ch. 42; *Re Financial Corporation, Holmes' Case*, L. R. 2 Ch. 714; *N. Y., etc.*, R. Co. v. Schuyler, 84 N. Y. 30; *Mill Dam Co. v. Ropes*, 6 Pick. 23; *Knowlton v. Congress, etc., Co.*, 14 Blatchf. 364; *Railway Co. v. Allerton*, 18 Wall. 235. See as to the meaning of "preference," "preferred," and "guaranteed," *Henry v. Gt. N. R. R. Co.*, 4 K. & J. 1, 21; *Taft v. Hartford, etc., R. R. Co.*, 8 R. I. 310, 333; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Matthews v. Great N. R. Co.*, 28 L. J. Ch. 375. Preferred shareholders, rights depend upon the peculiar provisions of their contracts. *Bailey v. Hannibal and St. Joe. R. R. Co.*, 1 Dill. 174; 17 Wall. 96; *Matthews v. Gt. N. R. R. Co.*, 28 L. J. Ch. 375; *West Chester, etc., Co. v. Jackson*, 77 Pa. St. 321; *Williston v. M. S., etc., R. Co.*, 13 Allen, 400. They have a right enforceable in equity to a priority in the distribution of profits. *N. Henry v. Great N. R. R. Co.*, 4 K. & J. 1; 1 DeG. & J. 606; *Sturge v. Eastern. R. R. Co.*, 7 DeG. M. & G. 158; *Smith v. Cork, etc., R. Co.*, Ir. Rep. 3 Eq. 356; *Bailey v. Hannibal, etc., R. Co.*, 1 Dill. 174; 17 Wall. 96; *Prouty v. M. S. & N. I. R. Co.*, 1 Hun, 655; *Thompson v. Erie R. Co.*, 45 N. Y. 468; *Stevens v. South Devon R. Co.*, 9 Hare Ch. 313; *Matthews v. G. N. R. Co.*, 5 Jur. N. S. pt. 1, 284; *Corey v. L. & E. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. Co.*, 19 Eq. Cas. 358; *Williston v. M. S. & N. I. R. Co.*, 13 Allen, 404. But when the company is wound up, preference shareholders have no priority in the distribution of the company's assets. In *re London I. R. Co.*, L. R. 5 Eq. 519, unless by express agreement. In *re Bangor, etc., Slab Co.*, L. R. 20 Eq. 59; *Totten v. Tison*, 54 Ga. 139; *Burt v. Rattle*, 31 Ohio St. 116. If the profits made during any one year are not sufficient to pay guaranteed dividends the deficiency must be made up from subsequent profits. *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310, 333; *Prouty v. M. S. & N. I. R. Co.*, 4 Th. & C. 230; 1 Hun, 655; *Henry v. Great North. R. Co.*, 4 K. & J. 1; 27 L. J. Ch. 1; 1 DeG. & J. 606; *Lockhart v. Van Alstyne*, 31 Mich. 76, 84; *Smith v. Cork, etc., R. Co.*,

Ir. Rep. 8 Eq. 356; 5 Eq. 65; Sturge v. Eastern N. R. Co., 2 DeG. & S. 531; Crawford v. North Eastern R. Co., 3 K. & J. 728; Matthews v. G. N. R. Co., 28 L. J. Ch. 375; Corey v. Londonderry, etc., R. Co., 29 Beav. 263; Coats v. Nottingham, etc., R. Co., 30 Beav. 86. Further as to the rights of preferred stockholders, see McGregor v. Home Insurance Co., 38 N. J. Eq. 181; Griffith v. Paget, L. R. 6 Ch. Div. 511; Muhlenberg v. Philadelphia, etc., R. Co., 47 Pa. St. 16; Campbell v. London, etc., R. Co., 5 Hare, 519; Pearson v. London, etc., R. Co., 14 Sim. 541; St. John v. Erie R. Co., 10 Blatch. 271; 23 Wall. 137; Corey v. Belfast, etc., R. Co., Ir. Rep. 2 C. L. 112; Webb v. Earle, L. R. 20 Eq. 556; Curran v. Arkansas, 15 How. 304; Pittsburg, etc., R. Co. v. Alleghany Co., 68 Pa. St. 126; MacDougall v. Jersey Imperial Hotel Co., 2 H. & M. 528. And as to the issuance of preferred stock see, also, Hoole v. G. N. R. Co., L. R. 3 Ch. 262; Barnard v. Vermont, etc., R. Co., 7 Allen, 512; Bryant v. Ohio College, 1 Cen. 67; Dickinson v. R. Co., 7 W. Va. 390; King v. Ohio, etc., R. Co., 9 Rep. 481; Furness v. Caterham R. Co., 25 Beav. 614; Chase v. Vanderbilt, 37 N. Y. S. C. (5 J. & S.) 334; Hutton v. Scarborough Cliff Hotel Co., 3 Dr. & Sm. 514; 5 DeG. J. & S. 672; Richardson v. Vermont, etc., R. Co., 44 Vt. 613; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536; Hazlehurst v. Savannah, etc., R. Co., 43 Ga. 13; Fielden v. Lancashire, etc., R. Co., 2 DeG. & Sm. 531; In re National Patent Steam Fuel Co., 4 Drew, 529; Moss v. Syers, 32 L. J. Ch. 711; Melhado v. Hamilton, 28 L. T. (N. S.) 578; 29 id. 364; Stevens v. Midhants R. Co., L. R. 8 Ch. 1064; Re Bristol, etc., R. Co., L. R. 6 Eq. 448; Re Devon, etc., R. Co., id., 610, 615; London, etc., Ass'n v. Wrexham, etc., R. Co., L. R. 18 Eq. 566; Munns v. Isle of Wight R. Co., L. R. 8 Eq. 655; Re East and W. Junc. R. Co., id. 87; Re Potteries, etc., R. Co., L. R. 8 Ch. 67; Re Cambrian R. Co., L. R. 3 Ch. 278; Re Anglo-Danubian S. N. Co., L. R. 20 Eq. 339; City of Covington v. Covington R. Co., 10 Bush, 69; Midland R. Co. v. Gordon, 16 M. & W. 804; Hoyt v. Quicksilver M. Co., 17 Hun, 169; McLaughlin v. Detroit, etc., R. Co., 8 Mich. 100.

Transfer of stock.—An assignment of shares carries with it the right to dividends. March v. Railroad Company, 43 N. H. 515, 520; Boston, etc., R. Co. v. Commonwealth, 100 Mass. 399; Goodwin v. Hardy, 57 Me. 143; Central, etc., R. Co. v. Paput, 59 Ga. 343; Gifford v. Thompson, 115 Mass. 478; Ryan v. Leavenworth, etc., R. Co., 21 Kan. 365, 403; Hill v. Newichawannick, etc., R. Co., 48 How. Pr. 427; Jones v. Terre Haute, etc., R. Co., 57 N. Y. 196; 29 Barb. 353; Kane v. Bloodgood, 7 Johns. Ch. 90; Hague v. Dandeson, 2 Exch. 741. Including dividends previously declared but not payable until after the time of the transfer. Burrows v. North Carolina, etc., R. Co., 67 N. C. 376. But see Spear v. Hart, 3 Roberts, 420; Bright v. Lord, 51 Ind. 273; City of Ohio v. C. & T. R. Co., 6 Ohio St. 489. See also, Currie v. White, 45 N. Y.; 1 Sweeny, 166; Black v. Homersham, L. R. 4 Ex. Div. 24.

Consolidation.—Where a new company is formed by the merger of several, some cases sanction an implied assumption by the new company of the debts and obligations of its predecessors. Thompson v. Abbott, 61 Mo. 177; Indianapolis, etc., R. Co. v. Jones, 29 Ind. 465; Columbus, etc., R. Co. v. Powell, 40 Ind. 40. Other cases do not accept this doctrine. See Prouty v. L. S. & M. S. R. Co., 52 N. Y. 363; Chase v. Vanderbilt, 37 N. Y. Superior Ct. 334; Powell v. North M. R. Co., 42 Mo. 63; Shaw v. Norfolk C. R. Co., 16 Gray, 407; see also, Selma, etc., R. Co. v. Hardin, 40 Ga. 709; Montgomery, etc., R. Co. v. Boring, 51 Ga. 532; Bruffett v. G. W. R. R. Co., 25 Ill. 357. Liens upon corporate property are unaffected by consolidation. Eaton, etc., R. Co. v. Hunt, 20 Ind. 457; Racine, etc., R. Co. v. Farmers' L. & T. Co., 49 Ill. 331; The Key City, 14 Wall. 654. Consolidative statutes commonly impose upon the new company the obligations of the old ones. The new company may then be sued at law. Columbus, etc., R. Co. v. Skidmore, 69 Ill. 566.

Statutes of limitations.—Foreign corporations cannot interpose these statutes as a defence either in personal (State v. Central Pac. R. Co., 10 Nev. 47;

Mallory v. Tioga R. Co., 3 Abb. App. 139) or in real actions. Barstow v. Union, etc., Co., 10 Nev. 47.

Interest.—That interest is collectible upon dividends due and unpaid see Prouty v. M. S. & N. I. R. Co., 1 Hun, 667; Adams v. Fort Plain Bank, 36 N. Y. 256; Dana v. Fiedler, 2 Kern. (N. Y.) 41; Hollingsworth v. Detroit, 3 McLean, 472; State v. Baltimore, etc., R. Co., 6 Gill (Md.), 868; Philadelphia, etc., R. Co. v. Heckman, 28 Pa. St. 329; King v. Paterson, etc., R. Co., 5 Dutch. (N. J.) 504.

DAVID S. DUNCOMB et al., Trustees, etc.,

v.

THE NEW YORK, HOUSATONIC & NORTHERN R. R. Co. et al.

(84 *New York Reports*, 190. *March 1, 1881.*)

The director of a corporation occupies a fiduciary position, and so is within the rule disenabling one entrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust.

The right of the corporation, or those claiming through it, to avoid any such dealings does not depend upon the question whether the director was acting fraudulently or in good faith.

But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received.

Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt.

The director of a railroad corporation cannot purchase its bonds below par except on peril of avoidance by the courts upon application of the corporation.

But as he may be the lawful holder of such bonds, knowledge upon the part of a purchaser from him for value and in good faith of bonds so bought that he is a director, does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title.

Where, however, bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter.

Under the provision of the General Railroad Act (sub. 10, § 28, chap. 140, Laws of 1850) authorizing a corporation organized under it to borrow moneys necessary for completing, finishing or operating its road, to issue and dispose of its bonds and to mortgage its property and franchises "to secure the payment of any debt contracted for the purposes aforesaid," a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified.

Upon foreclosure of a mortgage given to secure its bonds, a holder of bonds so pledged as collateral is not limited to proof of an amount simply equal to the amount of his debt, but is entitled to prove the whole amount of his bonds, and to share in the distribution accordingly up to the amount of his debt.

The L. and I. Co. by its charter (§ 5, chap. 780, Laws of 1871) is authorized to "advance moneys * * * upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced.

Where the president of a railroad corporation received the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary, *held*, that such a debt fairly and honestly incurred could be so secured; and that he was entitled to prove such bonds.

Also *held*, that one to whom bonds were pledged as security for an indebtedness for rent of offices was entitled to prove them; that a business office was essential and necessary and was embraced within the authority to issue bonds.

A pledgee of certain of the bonds claimed that the pledge had been foreclosed by sale at auction and that through such sale he became the owner; the terms of the sale, or whether before sale there was a demand of payment or notice to redeem did not appear. *Held*, that as no right to sell was shown, the holder of the bonds must still be treated as pledgee.

Where a question arises under a Federal law and respects a corporation created by its authority, the rulings of the Federal courts must be followed.

Accordingly *held*, that the decision of the United States Supreme Court, in *G. M. Co. v. Nat. Bank* (96 U. S. 64), was conclusive here, holding that a contract of loan made by a National bank was valid and could be enforced although violative of the provision of the National Banking Act (U. S. R. S., § 5200), prohibiting a loan to one individual exceeding one-tenth part of the capital of the bank.

(Argued November 30, 1880; decided March 1, 1881.)

THESE are appeals from order of the General Term of the Supreme Court, in the second judicial department, made September 14, 1880, affirming, reversing and modifying certain portions of an order of Special Term.

This action was brought to foreclose a mortgage executed by the defendant, the New York, Housatonic and Northern R. R. Co., to plaintiffs as trustees for bondholders.

A referee was appointed to ascertain the amount due on account of the bonds and the nature and extent of the interest of the bondholders, and to report with the evidence. The report of the referee was confirmed with two exceptions.

It appeared that a corporation was organized under the general railroad act in 1863, having the same name as the corporation defendant. Said corporation, in 1868, made its mortgage to plaintiffs as trustees for \$2,500,000. In 1872, said corporation was consolidated with the Southern Westchester R. R. Co., into the corporation defendant. In October, 1872, it made a mortgage for \$2,000,000, and exchanged its bonds secured thereby to the amount of about \$183,500 for bonds issued by the old corporation.

The referee found, as to the claims of Louis D. Rucker, that he produced bonds to the amount of \$1,117,000. That \$810,000 of these bonds were issued to said Rucker, as security for previous

advances made by him to said railroad company, amounting to \$81,000. That \$250,000 of said bonds were issued to the New York Loan and Indemnity Company as collateral security for a loan of \$25,000. That the claim of said New York Loan and Indemnity Company was placed in judgment against the railroad company, and the said judgment was assigned to Rucker for \$12,500. That the balance of said bonds were obtained by Rucker from the Bessemer Company, never having been issued to him or delivered to him by the railroad company, but were taken and held by him as security for certain advances made by him from time to time. It appeared that these advances were made on the joint obligations of the railroad company and the Bessemer Company, which latter company had a contract for the construction of the road of the former. At the time of these advances Rucker was president of the railroad company. The referee held that Rucker was entitled to prove said \$81,000 of bonds only to the extent of his claim of \$81,000 and interest thereon. That he was entitled to prove the bonds assigned to him by the Loan and Indemnity Company only to the extent of the \$12,500 paid by him with interest. That the balance of bonds claimed by him were of no value in his hands and he was not entitled to receive any payment thereon.

The facts in relation to the other claims discussed, so far as they are material, are set forth in the opinion.

John M. Whiting and Henry W. Johnson for plaintiffs and others. The railway corporation had full power, under the laws of New York, to borrow money for its corporate purposes and to secure the lenders by a delivery to them of its first mortgage bonds in pledge for there payment of any loans it might contract. (*Curtis v. Leavitt*, 15 N. Y. 9; *Beers v. Glass Co.*, 14 Barb. 358; *Bradley v. Ballard*, 55 Ill. 413; *Barry v. Mer. Ex. Co.*, 1 Sandf. Ch. 280; *Mead v. Keeler*, 24 Barb. 20; *Coe v. Pennock*, 23 How. 117; *F. L. & T. Co. v. Hendrickson*, 25 Barb. 484; *King v. Mer. Ex. Co.*, 1 Seld. 547; *Leavitt v. Blatchford*, 17 N. Y. 557; 22 id. 494; 26 id. 410; *Tallmadge v. Pell*, 7 id. 328, 348; *Sackett's H. Bk. v. Codd*, 18 id. 242; *Oneida Bk. v. Ontario Bk.*, 21 id. 490; *Smith v. First Nat. Bk.*, 99 Mass. 605; *Parish v. Wheeler*, 22 N. Y. 494; *Allen v. R. R. Co.*, 11 Ala. [N. S.] 437; *R. R. Co. v. Tallman*, 15 id. 472; *Phillips v. Winslow*, 18 B. Monr. 431; *Bissell v. R. R. Co.*, 22 N. Y. 258; *Brice on Ultra Vires* [1st ed.]; *Angell & A. on Corp.* 200; 1 Cow. 513; 21 Pick. 270; 6 *Humph. [Tenn.]* 515; *Middletown v. Rondout & Oswego R. R. Co.*, 43 How. 481; *South. Life Ins. Co., etc., v. Lanier*, 5 Fla. 110, 165; *Walworth Co. Bk. v. Farmer's L. & T. Co.*, 16 Wis. 629; *Scott v. Johnson*, 5 Bosw. 213; *Barry v. Merchants' Ex. Co.*, 1 Sandf. Ch. 280, 289; 1 Seld. 574; *Curtis v. Leavitt*, 15 N. Y. 9, 62-66; *Smith v. Law*, 21 id. 298; *Belmont v. Erie R. R. Co.*, 52 Barb. 637, 670; *Pusey v. N. J. R. R. Co.*, 14 Abb. Pr. [N. S.] 435; *Butler v. Rham*, 46 Md.

541; *Carpenter v. Blackhawk Mining Co.*, 6 N. Y. 43; *Cent. Gold Mining Co. v. Pratt*, 3 Daly, 263; 2 R. S., 1875, 532, part 1, chap. 18, tit. 15, § 39; *Laws of 1850*, chap. 140, § 28; *Thompson v. Erie R. R. Co.*, 42 How. Pr. 68; *Hoyt v. Thompson*, 19 N. Y. 207; *Walworth Bk. v. Farmers' L. & T. Co.*, 16 Wis. 629; *Angell & A. on Corp.* 200; 15 Johns.; 1 Cow.; 21 Pick.; 6 Humph.; *South. Ins. & Trust Co. v. Lanier*, 5 Fla. 110, 165.) Mr. Rucker, while president of the corporation, might lawfully loan to it his moneys for its corporate purposes and take its first mortgage bonds in pledge as security for his repayment to the same extent and in the same manner as any other lender might do. (*Hoyt v. Thompson's Exr.*, 19 N. Y. 207; 5 Abb. [N. S.] 461, 462; 5 Bosw. 178; 26 N. Y. 410; *Brice on Ultra Vires* [1st ed.], 402; 16 Beav. 485; 10 H. of L. 26; 31 L. J. Ch. 369; *Imp. M. C. Ass'n v. Coleman*, L. R., 6 H. of L. 189; *Story on Agency*, §§ 351 et seq.; *Twin Lick Oil Co. v. Marbury*, 1 Otto [91 U. S.], 587; *Koehler v. Black River F. Iron Co.*, 2 Black, 715; *Drury v. Cross*, 7 Wall. 299; *Luxemburg R. R. Co. v. Maquacy*, 25 Beav. 586; *The Cumb. Coal Co. v. Sherman*, 30 Barb. 553; 16 Md. 456; *Hoyle v. Plattsb., etc.*, 54 N. Y. 314; *Buel v. Buckingham*, 16 Iowa, 284; *Cent. R. R. v. Cleg-horn*, 1 Speers' Eq. 545; *Van Hook v. Somerville R. R. Co.*, 5 N. J. Eq. 137-633; *St. Louis v. Alexander*, 23 Mo. ; *Merrick v. Penn. Coal Co.*, 61 Ill. 492; *So. Baptist Ch. v. Clapp*, 18 Barb. 35; 20 Vt. 425; 13 Metc. 497; 21 Pick. 270; 22 N. Y. 526; *Hoyle v. R. R. Co.*, 54 id. 314; *Brice on Ultra Vires*, 400, et seq.; *Risley v. Ind. R. R. Co.*, 62 N. Y. 247; *Smith v. Lansing*, 22 id. 520; *Barnes v. Brown*, 11 Hun. 315 [Ct. App. MSS. April, 1880]; *Coe v. N. Y. Midland R. R. Co.*, 4 Stewart's Eq. [N. J.] 105, 137; *Chicago Building Soc. v. Crowell*, 65 Ill. 458; *De Groff v. Am. L. T. Co.*, 21 N. Y. 127-8; *Parish v. Wheeler*, 22 id. 503; *Bissell v. M. S. & N. I. R. R. Co.*, id. 258; *Story on Agency*, §§ 329 et seq.; *Mayor v. Ray*, 19 Wall. 468; *Alleghany City v. McClurken*, 14 Penn. St. 81; *Ass. Co. v. Ass. Co.*, 3 Griff. 521; affirmed on appeal, 8 Jur. [N. S.] 628; *Society v. Co.*, 5 DeG., M. & G. 465; *Wilson's Case*, L. R., 12 Eq. 521; 7 Chan. 45; *Tallmadge v. Pell*, 7 N. Y. 728, 748; *Sackett's H. Bk. v. Codd*, 18 id. 242; *Oneida Bk. v. Ontario Bk.*, 21 id. 490; *Dillon on Municipal Corp.*, § 750; *Matter of German Mining Co.*, *Ex parte Chippendale*, 4 De G., M. & G. 19; *Ex parte Rignold*, 22 Beav. 353; *Lowndes v. Mining Co.*, 33 L. J. Ch. 418; 3 N. R. 601; *Matter of Cork R'y Co. L. R.*, 4 Ch. 748.) A lender of money in good faith, holding bonds as security for his repayment, stands to the extent of his loans as a bona fide purchaser of the bonds, and is entitled to the same protection and relief in the enforcement of his rights as if he were a purchaser of the bonds at their full value. (*Brookman v. Metcalf*, 32 N. Y. 591; *Bank v. Hoge*, 35 id. 65; *Platt v. Beebe*, 57 id. 339; *Nelson v. Edwards*, 40 Barb. 279; 42 N. Y. 490; 3 Sandf.

222; 63 Barb. 215-237.) While upon a consolidation of two railway corporations, the legal debts of both become the unquestionable debts of the consolidation, yet that principle has no application to the fraudulent debts of either, and there can be no presumption of validity or of lawful lien in respect of such fraudulent debts, because the consolidated company has seen fit to exchange its bonds for bonds so fraudulently obtained. (*Peterson v. Mayor*, 17 N. Y. 449; 17 Barb. 397; *Cumb. Coal Co. v. Sherman*, 30 id. 553.) While the mere default in paying coupons is not of itself a prevention to the transfer of bonds to bona fide purchasers, it is a circumstance of suspicion and notice that may, when coupled with other circumstances, destroy such a character in a purchaser. (*First Nat. Bk. St. Paul Co. v. Commissioners*, 14 Minn. 77.) The claimants contesting the claims of Rucker are concluded by the rightful action of the corporation through whom alone they claim. If the Corporation is lawfully bound and directly concluded as to Rucker from making any claim against him, the assigns of the corporation are equally estopped, there being no fraud or lack of good faith imputed to the transactions. (*Hoyt v. Quicksilver Mining Co.*, 78 N. Y. 159; *Walworth Co. Bk. v. Farmers' L. & T. Co.*, 16 Wis. 629; *Kelsey v. Nat. Bk.*, 69 Penn. St. 426; *Story on Agency*, §§ 239, 252, 260.) The suit began in Connecticut, and the proceedings setting off the property of the corporation in that State having been declared null and void, and it being adjudged that nothing was taken by virtue of them, Mr. Rucker's claim, lien and debt against the railroad company and his bonds were not affected or impaired by reason thereof. (2 R. S. [Edm. ed.] 389.) The transaction with the National City Bank of Brooklyn being illegal, gives to the bank no higher or more perfect right to the bonds than Mead himself has. (*Barton v. Plank R. Co.*, 17 Barb. 397.) It was the duty of the president of the bank to satisfy himself as to the bonds, with the degree of notice that he had; and, not having done so, he stands in submission to the fact, whatever it might be. (*Wade on Notice*, §§ 37-39; *Story v. Arden*, 1 Johns. Ch. 261; *Birdsall v. Russell*, 29 N. Y. 220.) There is in the General Railroad Act no prohibition against the corporations created thereby contracting legitimate debts in the ordinary course of their business, and mere indiscreet management will not be ground for interference by a court called on to review a corporation's acts. (*Bk. of U. S. v. Dandridge*, 12 Wheat. 113; 1 Sandf. Ch. 280; *Smith v. Law*, 12 N. Y. 296, 299; 15 id. 62, 220, 266, 268; *Laws of 1850*, chap. 140, § 6.) In the absence of a statutory prohibition, a corporation can deal precisely as an individual can. (*Mott v. Hicks*, 1 Cow. 513; *Curtis v. Leavitt*, 15 N. Y. 64, 66.) The fact that Mr. Kirkland was an officer of the company at the time he took the security does not vary his rights so long as his debt was a just one, untainted with fraud, and so long as he secured no undue advantage

to himself as against other persons interested in the property of the corporation. (*Coe v. Pennock*, 23 How. 117; *F. L. & T. Co. v. Hendrickson*, 25 Barb. 484; *King v. Mer. Ex. Co.*, 1 Seld. 547; *Leavitt v. Blatchford*, 17 N. Y. 557; *Parish v. Wheeler*, 22 id. 494; *Nelson v. Eaton*, 26 id. 410; *Hoyt v. Thompson's Ex'r*, 19 id. 207.) The delivery of the bonds to Kirkland being open and above board, and the deliberate act of the board of directors, the representatives of the corporation, and its lawful statutory managers, must be sustained. (*Bk. of U. S. v. Dandridge*, 12 Wheat. 113.) Under these circumstances no other purchaser or holder of bonds can complain. (*Caylus v. Kingston, etc., R. R. Co.*, 10 Hun, 295; 77 N. Y. 609.) Until an offer of payment and redemption is made, and its refusal is shown, the holder of the pledge holds it for its value, and retains all his rights. (*Bruen v. Hone*, 2 Barb. 586; *Wood v. Oakley*, 11 Paige, 400; *Carnes v. Platt*, 59 N. Y. 405; *Mumford v. Am. L. Ins. & T. Co.*, 4 id. 482-3; *McDonald v. Neilson*, 2 Cow. 139.)

Jesse Johnson and E. Ellery Anderson for National City Bank of Brooklyn and others. There was no authority in the trustees or the company to use bonds issued under the mortgage to the trustees to pay debts incurred prior to and not released or affected by its issue. If such authority existed it could not be exercised to the prejudice of bona fide purchasers of the bonds. (3 Edm. Stat. at Large, 628, § 28, subd. 10; *Seymour v. Canandaigua R. R.*, 25 Barb. 284; 14 How. Pr. 531; 7 Edm. Stat. at Large, 337; chap. 779, Laws of 1868; *Cumberland Coal Co. v. Sherman*, 30 Barb. 565, 567; *Gardner v. Ogden*, 22 N. Y. 343; *Butts v. Wood*, 37 id. 317; *Coleman v. Second Avenue R. R. Co.*, 38 id. 201; *James v. Cowing*, 17 Hun, 256; *Barnes v. Brown*, 11 id. 315.) Mead had such a possession and indicia of title that he could, as toward a person acting in good faith, give a good and available title. (*Barnard v. N. Y. & H. R. R. Co.*, 25 N. Y. 496.) Whatever the title of Mead or the bank may have been in the old bonds, it is now perfect and absolute in these bonds. (*Coal Co. v. Sherman*, 30 Barb. 563.) Every holder in good faith and for value of the bonds of a corporation is entitled to recover their full amount against the maker. (*Cromwell v. Co. of Sac*, 96 U. S. 51-60.) The fact that the loan made to the maker was less than the face of the bonds does not affect or diminish the right of the holder, except that it limits his recovery to the amount of the loan and interest. (*Hodge's Appeal*, 84 Penn. St. 359.)

FINCH, J.—It is not possible, in this case to go much beyond a brief statement of our conclusions. To discuss all the questions raised by the numerous appeals, through their voluminous and complicated details, would prolong an opinion beyond what is either necessary or profitable.

We have reached the conclusion that the appellant, Rucker, should be allowed to prove in full all of the \$810,000 of bonds, which he holds as a pledge, to secure the debt due him from the railroad company of \$81,000 and interest, and which he can produce for that purpose; and is entitled to share in the distribution upon that basis to the extent of such indebtedness. It is not intended to deny or question the rule that whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests, and that he falls, therefore, within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involving such confidence. (*Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 328; *Gardner v. Ogden*, 22 id. 327; *Twin Lick Oil Co. v. Marbury*, 1 Otto, 587; *Smith v. Lansing*, 22 N. Y. 531; *Aberdeen Ry. Co. v. Blaikie Bros.*, 1 Macq. 461, per Lord CRANWORTH.) Nor is it at all questioned that, in such cases, the right of the beneficiary or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character. (*Davoue v. Fanning*, 2 Johns. Ch. 260.) But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus, the beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. (*York Co. v. McKenzie*, 8 B. Par. Cas. 42.) To cling to the fruits of the trustee's dealing while seeking to avoid his act; to take the benefit of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust. It would turn a rule designed as a protection, into a weapon of offence and injustice. And where the trustee's act consists, not in possessing himself of the property of the beneficiary as owner, but in taking collateral security for a debt honestly due him, or a liability justly incurred, the rule can have no application, since the payment of the debt or the discharge of the liability is an essential prerequisite of the avoidance. And this is true whether the pledge be taken for a present or precedent debt. In either case the equity to be regarded equally exists. It is upon this ground that the case of *Smith v. Lansing* (22 N. Y. 520) stands. The collateral taken there was after the creation of

the liability, and we held the transaction valid. The ground of the decision was distinctly stated to be that the association had received the direct benefit of the several amounts of money to secure which the bonds were given, and the creditors had indirectly received the benefits of the same by the consequent increase of the assets; and that, upon the application of the beneficiary or its receiver, the trustee should be permitted to set up any equities which existed, entitling him to retain the property, either absolutely or as security for the moneys advanced or liabilities incurred. Since, therefore, in the case of a pledge delivered as security for a just and honest debt, the principal may always redeem upon payment, and the rule of equity is in no respect different, we do not see that it has any application, or can in any respect modify the legal relation of the parties.

The pledge of Rucker and its validity is, however, attacked from another and a different direction. It is argued that the right to make the mortgage under which the bonds were issued is given by the statute (Laws of 1850, chap. 140, § 28, subd. 10), and is limited to an authority, "from time to time, to borrow such sums of money as may be necessary for completing and finishing, or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid." It is then argued that the railroad corporation had no right to pledge its bonds as security for a precedent debt, as was done in the present case. But if the precedent debt was contracted in the process of borrowing money for the construction or operation of the railroad, we do not see that the purpose of the statute is at all violated or avoided. Its terms do not require that the borrowing and the issuing of the bonds should be simultaneous acts. The former may naturally and properly precede the latter. In the present case there is neither proof nor intimation that the loan of Rucker was for a purpose outside of the statute, but on the contrary all the facts indicate that the money he advanced went actually into the construction of the road.

We conclude, therefore, that he is entitled to prove so many of the \$810,000 of bonds as he holds, and can produce as pledgee, and share in the distribution accordingly up to the amount of his debt.

It was error to reject the bonds held by Rucker as the assignee of the Loan and Indemnity Company, and those which he received as a pledge from the Bessemer Company. The transactions relating to these bonds occurred after he had ceased to be an officer of the railroad company, and when he occupied toward it no relation of trust or confidence which could, on any theory, expose his action to scrutiny or criticism.

He dealt, therefore, like any other stranger, and is entitled to prove such of these bonds as he holds as pledgee and can produce for that purpose, and receive the dividends thereon to the amount of the debts respectively which the bonds were pledged to secure. The objection made to the title of the Loan and Indemnity Company that it violated the law in discounting the note of \$25,000, and so the pledge falls with it (R. S. part 1, tit. 20, chap. 20, §§ 1 and 5), is answered by a reference to the charter of the company (Laws of 1870, p. 1803), which authorized it to "advance moneys, securities and credit upon any property, real or personal," and by our recent decisions, that, even if the note discounted was void, the loan and its security were valid, and capable of being enforced. (*Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, id. 449.)

We see no reason to disturb the conclusion arrived at by the referee and affirmed by the General Term as to the bonds of Henry W. Johnson, amounting to \$40,500. His ownership is assailed by Rucker, who claims that he lacks forty-two bonds of those originally pledged to him, and that they now appear in Johnson's possession. The latter received them from one Ball, who was a contractor, and who got them from the railroad company in settlement of his account. As Rucker, at one time, surrendered his pledged bonds, and devoted them to the construction of the road, so that it was possible for Ball to receive them rightfully, we do not see that the title of Johnson is imperfect, or that Rucker has established any paramount claim.

Artemas S. Cady was found by the referee to be the owner of \$31,000 of the bonds, and the pledgee of \$34,000 more, which last were held as collateral to a loan of \$5000 and interest. The loan was through the Bessemer Company, to whom the bonds had been promised upon their contract for construction. The referee allowed the bonds owned to be proved in full, and those held in pledge also in full, but limiting the dividend thereon to the amount of the loan and interest.

Inadequacy of consideration, and an alleged inability of a railroad corporation to apply its bonds by way of pledge, at least as security for a precedent debt, were the only grounds of objection urged. We do not think they are sound. Since Cady was neither officer nor director, and owed no duty by virtue of such relation to either the Bessemer Company or the railroad, he had unquestionably the right to take as large a "margin" for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale, and in the absence of proof that the proceeds of the loan were, with the knowledge of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why

they might not be used as a pledge to secure an indebtedness already existing. We agree, therefore, as to these bonds with the conclusion of the referee.

Charles D. Bailey bought \$10,000 of the bonds of the old company from E. F. Mead, who was, at the time, one of its directors. After the consolidation Bailey was allowed, upon the surrender of his old bonds, to receive an equivalent amount of the new ones. It is objected that Mead bought these bonds of his company at fifty-one cents on a dollar, which is probably true; that being a director he could not thus buy below par except at the peril of avoidance by the courts upon the application of the corporation, which must be conceded (*Cumberland Coal Co. v. Sherman*, 30 Barb. 565; *Butts v. Wood*, 37 N. Y. 317; *Coleman v. Second Ave. R. R.*, 38 id. 201); that his title was, therefore, defective, which, as between himself and the company, may be granted; and that Bailey, being also a director, was not protected in his purchase. The difficulty is an utter absence of proof as to the last material fact. We do not know the date of Bailey's purchase. It may have been before he was elected director. If so, there was nothing to affect his position as a purchaser for value and in good faith, unless the fact that he knew Mead to be a director was enough to put him on inquiry and charge him with constructive notice of the defect in the title. We cannot so decide. A director may be the lawful and honest holder of the bonds of his company. There is no presumption to the contrary. The fact is not even just ground of suspicion. The referee, therefore, properly allowed the \$10,000 of bonds to be proved in full. As to the remaining \$1500, our conclusion is different. They were plainly a bonus, taken by Bailey, while a director, on his stock subscription, and for which he paid nothing. His attempted reversal of the process is wholly ineffectual in the face of the proved action of the company authorizing the bonds to be given as a bonus, instead of the stock. We cannot sustain this transaction. Very likely the stock was worthless, but that does not palliate or excuse the proceeding. It is true the bonds were exchanged for those of the new company, and that fact is relied upon to make him a holder for value, and as a ratification by the company. But either view is answered by the fact that he was a director when the exchange was authorized and when it was made. He had the power and the opportunity to aid in an effort to ratify his previous wrong, while his obvious duty as an official was exactly the reverse. He had full knowledge of all the facts and did not act in good faith. The \$1500 of bonds, therefore, cannot be proved.

These views involve in the same fate the bonds of both Hall and Benedict. They each received their bonds as a bonus while they were directors of the company, and remained such

when the new bonds were made and authorized to be exchanged. It is said in the opinion of the General Term that the bonds of Hall were not disputed. That is a mistake. Their allowance by the referee was expressly excepted to on behalf of Rucker.

The bonds of Austin Stevens were properly allowed to be proved. He bought them of Duncomb who was a director, and whom he knew to be such, but did not know how Duncomb obtained them, or of any defect in his title.

Those of Daniel H. Temple for \$5000 were allowed by the referee, but rejected by the General Term. They were taken by him of Duncomb in pledge for a precedent debt. As a consequence he cannot be deemed a holder for value, and must be held to have taken no better title than that of his pledgor. (*Taft v. Chapman*, 50 N. Y. 445; *Coddington v. Bay*, 20 Johns. 645; *Stalker v. McDonald*, 6 Hill, 93; *Weaver v. Barden*, 49 N. Y. 286.) The title of Duncomb was vulnerable. He got his original bonds from the company, partly for alleged salary, partly at fifty-one cents on the dollar, and partly as a bonus for stock subscription. He was a director in the old company while thus obtaining the bonds and a director in the new company when the exchange of securities was made. His title, therefore, was bad and that of his pledgee must fall with it.

As to the bonds of Joshua C. Saunders, there appears to be no doubt that he was the actual owner and holder of \$6000 of them. The referee so finds, and the evidence warrants his conclusion. The balance of \$21,000 were held by him as collateral to a note of \$1000. Pending the inquiry before the referee the pledge was foreclosed by a sale at auction, and Saunders testifies that through such sale he became the owner. His testimony is, "these bonds I now own by sale under the power given in the note under which they were hypothecated." That is all we know about it. What the terms of the note were; whether before sale there was a demand of payment and opportunity to redeem (*Milliken v. Dehon*, 27 N. Y. 364; *Lawrence v. Maxwell*, 53 id. 19); whether the sale was on notice or not, and who became the purchaser, we are left to imagine. We are, perhaps, bound to assume from what is shown that he bought them in at the sale. He does not assert any other or different title. If so, he must still be treated as pledgee since he had no right to buy. (*Bryan v. Baldwin*, 52 N. Y. 232.) The referee correctly decided that these bonds held as collateral could be proved in full, but the dividend payable upon them should be limited to the amount of the debt. The pledge appears to have been for present advances, so that Saunders was a holder for value. (*Durbrow v. McDonald*,

5 Bosw. 130; *Winne v. McDonald*, 39 N. Y. 233; *McNeil v. Tenth National Bank*, 46 id. 325.) The modification by the General Term which tended to destroy his margin was erroneous.

In the case of the National City Bank we think the referee was wrong, and the modification made by the General Term was also erroneous. The bank loaned \$35,000 to George W. Mead, who at the time was a director in the railroad corporation, and known to be such, taking \$70,000 of the bonds as collateral. There is no proof that the bank or any of its officers had any knowledge of a defect in his title. That they knew him to be a director was not enough, as we have already said, to put them on inquiry. It is further claimed, however, that the bank, having a capital of \$300,000, violated the law in making this loan to Mead of \$35,000. (National Banking Act, §§ 5200, 5239, U. S. Stat.) The penalty of such violation is fixed by the act itself, and consists in proceedings against the franchise of the bank, and a liability for damages of the offending officers. As to this question, which arises under the Federal law, and respects corporations created by its authority, we must follow the rulings of the Federal courts, and those determine very clearly that the contract of loan was not invalid but may be enforced. (*Gold-Mining Co. v. National Bank*, 96 U. S. 640.)

As to the claim of John J. Studwell for \$70,000 of bonds, we must be guided by the findings of the referee, that Studwell, by assignment from Cornell, the Park Bank and The National Citizens' Bank, acquired their rights to the debts held by them respectively, and the bonds pledged as collateral. His title as pledgee, derived from these sources, has not been successfully attacked; and the referee, instead of limiting him to the proof of bonds equal to the debts secured, should have allowed him to prove all the bonds and receive a dividend thereon to an amount not exceeding the amount of the debts for which they were held as collateral.

The claim of the East River National Bank should be corrected in the same way. It should be allowed to prove all its bonds and share in the distribution to the amount of the debt for which it holds them as security.

The bonds of Eliza Hatfield, held by her to the amount of \$20,000, were allowed by the referee to the extent of \$2137, and no more. This was the amount found due upon the debt for which the bonds were held as collateral. The referee's finding was corrected at Special Term, in accordance with the exception filed on the claimant's behalf, and it was determined that she held \$13,000 of the bonds as collateral, and should be entitled to receive their proper dividend up to the sum of \$2352.65, and owned \$8000 of said bonds absolutely. There is evidently still an error, for the two sums make \$21,000 of bonds instead of \$20,000, which was the whole amount. On examining the exception, which was allowed

by the Special Term, it is evident that the collateral bonds were 1087 to 1098, both inclusive, or \$12,000 instead of \$13,000. On this claim, therefore, the \$8000 of bonds should be proved in full, and also the remaining \$12,000; but on these last no dividend should be paid beyond the sum of \$2352.65.

The bonds of George W. Mead, to the amount of \$19,500, were disallowed by the referee, but allowed by the General Term, at the amounts said to have been actually paid by him. The evidence leads us to prefer the conclusion of the referee. It is extremely doubtful whether Mead paid anything whatever for the bonds. His position as director, and the manner in which he sought to use it for his own benefit, make it very clearly our duty to avoid the whole transaction and affirm the conclusion of the referee.

As to the Grocers' Bank, it is conceded by the counsel for the receiver that we can do no more than affirm the conclusion of the General Term.

The claim of William R. Kirkland was rejected both by the referee and the General Term. He was elected president of the railroad company in 1873 and his salary fixed by a resolution of the board of directors at \$5000 per annum. The company failed to pay and gave him its notes for \$3500 and \$7000 of the mortgage bonds as collateral. The salary was honestly due. It was a just debt against the company. The latter has no possible ground of defence against it. Why might not such a debt, fairly and honestly incurred, in the absence of means of payment, be secured by the pledge of the bonds? Grant that the creditor's official position should awake scrutiny and sharpen criticism. Yet the right of the officer to fair compensation which has been honestly earned is as clear as that of a stranger. His services were as necessary to the construction of the road as those of the laborer who laid the rails. The president took the bonds merely in pledge. The right of redemption remained. The company could at any time have re-possessed its bonds upon the condition, surely equitable, of paying the debt it owed. No undue or improper advantage was obtained. We are of opinion, therefore, that Kirkland is entitled to prove his bonds, and share in the distribution on that basis.

The Seaman's Bank for Savings also appeals from the order which excludes it from the benefit of \$2000 of bonds held as collateral. It appears that the company was indebted to the bank for rent, and these bonds were turned out as security. The bank had the right to demand and receive them. No possible ground of objection occurs to us except an assertion that such use of the bonds was not justified by the lawful purposes of their issue, and the perversion was of course known to the pledgee. But such a construction would be altogether too rigid and narrow. A business office was essential and necessary and fairly embraced within the

authority to issue bonds for the purpose of building, operating and maintaining a railroad. It was a necessary and indispensable aid to the end sought to be accomplished. As the bank was merely a creditor, it had the right to insist upon security for its rent, and having received a pledge of the bonds to hold them, and prove them to their full amount, and receive a dividend thereon, not exceeding the amount of their debt.

We are satisfied with the conclusion reached as to the bonds of Mordecai M. Smith. As to \$9000 of them he was found to be purchaser and owner and permitted to prove them as such. As to the larger amount, all parties seem to concur in treating the alleged title of Wiley, obtained upon a sale of the collateral at auction, as not affecting results. To give it effective force in the absence of definite proof as to its regularity and propriety, and under the circumstances of suspicion which surround it, would hardly be justifiable; and since all his rights were assigned to the parties for whom he evidently acted, it is proper to dismiss it from consideration, and treat the case as if he had not intervened. The firm of Mead & Clark made certain advances to the railroad company upon the faith of these bonds pledged with them as collateral security. Since both were directors the transaction, even if open to criticism, and liable to avoidance, was modified by the further fact that the bonds were pledged for actual advances, and therefore the avoidance could only be made upon condition of the repayment of the advances. Mead & Clark could assign to Smith their debt due from the company and the collateral with it, though not as their own property or in derogation of the rights of the original pledgor. (*Nash v. Mosher*, 19 Wend. 431; *White v. Platt*, 5 Den. 269; *Hays v. Riddle*, 1 Sandf. 248; *Lewis v. Mott*, 36 N. Y. 395.) By the assignment to Smith he acquired the rights of Mead & Clark to the extent of their advances, and was properly allowed to prove his bonds as security for that amount.

We should modify the orders of the Special and General Terms to correspond with these views if the facts before us would admit of so doing with absolute accuracy; but as we cannot say what bonds may or may not be produced and proved under our rulings we reverse the orders of the Special and General Terms and remand the case to the Special Term for a further hearing, costs to be adjusted below.

All concur.

Ordered accordingly.

The fact that directors of corporations are fiduciaries does not preclude them from dealing with their company. They may borrow from it, lend to it, or deal with it in any manner the same as other persons. But they must deal fairly and not fraudulently or oppressively. *Harts v. Brown*, 77 Ill. 226. Their dealings with their company though not per se void, are voidable upon

the company's suit. *Ashhurst's Appeal*, 60 Pa. St. 290; *Stewart v. Lehigh Val. R. R. Co.*, 88 N. J. L. 505.

Compensation. Thus, the company objecting, directors cannot bind it by a contract made by themselves with reference to their own compensation or employment. *Gardner v. Butler*, 30 N. J. Eq. 702; *Blatchford v. Ross*, 5 Abb. Pr. N. S. 434; *Butts v. Wood*, 37 N. Y. 317; S. C., 38 Barb. 181. See also *Ogden v. Murray*, 39 N. Y. 202; *Levisse v. Shreveport C. R. Co.*, 27 La. Ann. 641.

Debts. Directors cannot by resolution as directors, create, revive or continue a debt to themselves and against their company. *Coleman v. Second Ave. R. R. Co.*, 38 N. Y. 201. Nor can they make the corporation assume a debt due a third person for which they are personally responsible. *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144. They cannot use the funds of the company to pay a note made by them to the president of the company, but for its benefit. *Gallery v. National Exchange Bank*, 41 Mich. 169. They cannot vote that a payment be indorsed upon their notes to the company. *Alford v. Miller*, 32 Conn. 548. See also, *First Natl. Bank v. Gifford*, 47 Iowa, 575; *Drury v. Cross*, 7 Wall. 802; *Jackson v. Ludeling*, 21 Wall. 616; *Richards v. New Hampshire I. Co.*, 43 N. Y. 268; *Coons v. Tome*, 9 Fed. Rep. 583.

An assignment by the president and lessee of a corporation of its property for the payment of his individual debts is in breach of trust. *Conro v. Port Henry I. Co.*, 12 Barb. 27. A bank president cannot certify his own checks upon his bank. *Claffin v. F. & C. Bank*, 24 How. Pr. 1; S. C. 25 N. Y. 293. Nor can a bank cashier bind it as an accommodation indorser of his own note. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; S. C. 3 Dill. 403.

Construction Contracts. Officers of a corporation cannot bind it by construction contracts made directly with themselves or in which they have a secret interest. *Wardell v. Railroad*, 103 U. S. 651; *Ryan v. Leavenworth, etc.*, R. Co., 21 Kan. 365; *Wardell v. U. R. R. Co.* 4 Dill. 330; *Bestor v. Wathen*, 60 Ill. 188; *European, etc.*, R. Co. v. *Poor*, 59 Me. 277; *Paine v. Lake Erie, etc.*, R. Co., 31 Ind. 283; *Port v. Russell*, 36 Ind. 60; and a president of a railway corporation taking an assignment of such a contract will hold it in trust for his company. *Risley v. Indianapolis, etc.*, R. Co. 1 Hun, 202; S. C. 62 N. Y. 240. See also, *F. & P. M. R. Co. v. Dewey*, 14 Mich. 477. But a contract made between two corporations through their respective boards of directors is not voidable at the election of one of the parties thereto from the mere circumstance that a minority of its board of directors are also directors of the other company. *U. S. R. R. Co. v. A. & G. W. R. Co.*, 34 Ohio St. 450; and see *Mayor v. Inman*, 57 Ga. 371. But compare *Godin v. Cincinnati, etc.*, R. Co. 169, and *President v. San Diego, etc.*, Co., 44 Cal. 106, and a directors contract with his company is enforceable as to third persons, the company not resisting. *Stewart v. Lehigh Val. R. Co.*, 38 N. J. L. 505. By statute a contractor with a corporation may be disqualified from becoming a director of it. *Foster v. Oxford, etc.*, R. Co., 76 E. C. L. R. [13 C. B.] 301.

Contracts with reference to the purchase and sale of corporate property. Directors cannot, without special authority so to do, bind their company by a sale of any of its property, for example, a patent, which is essential for the transaction of its customary business. *Abbott v. Am. Hard Rub. Co.*, 33 Barb. 578. They cannot convey the company's property as their own (*Pennsylvania Co.'s Appeal*, 80 Pa. St. 265), nor sell it to themselves (*Gray v. N. Y. & V. St. Co.*, 3 Hun, 388), nor convey it in trust to certain of their number, as trustee (*Ogden v. Murray*, 39 N. Y. 202; but see *Ellis v. B. H. & E. R. Co.*, 107 Mass. 1), nor organize a new company and sell out to it (*Coleman v. Second Ave. R. Co.*, 38 N. Y. 201. See also *Cumberland C. & I. Co.*

v. Sherman, 80 Barb. 553; *Cumberland C. & I. Co. v. Parish*, 42 Md. 596). Nor can directors, or a superintendent of a company purchase its property at a judicial sale thereof. *Harts v. Brown*, 77 Ill. 226; *Cook v. Berlin Woolen M. Co.*, 43 Wis. 447; *Cov. & Lex. R. Co. v. Bowler*, 9 Bush [Ky.], 468. *Cumberland, etc., Co. v. Sherman*, 80 Barb. 553; *Hoyle v. Plattsburg, etc., R. Co.*, 54 N. Y. 814. Directors taking conveyances of their company's property to themselves will hold as trustees for their companies (*B. N. Y. & E. R. Co. v. Lampson*, 47 Barb. 533; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485), and agents of a company to buy land for it must not accept a commission from vendor (*Morrison v. Ogdensburg, etc., R. Co.*, 52 Barb. 173), nor may they buy the land themselves and sell it to the company at an advance rate. *McAleer v. Murray*, 58 Pa. St. 126.

A director's incapacity to deal on his own behalf in respect to the corporate property, is not limited to the particular times when he is acting as director, but continues during the period of his directorship. *Hoyle v. Plattsburg, etc., R. Co.*, 54 N. Y. 814. And promoters of a company acting as its agents are fiduciaries. *Simons v. V. O. & M. Co.*, 61 Pa. St. 202; *Rice's Appeal*, 79 Pa. St. 168. Any agreement to influence directors or other corporate agents to act for the benefit of others and to the prejudice of their companies is fraudulent and void. *Bliss v. Watterson*, 45 N. Y. 22; *S. C.* 52 Barb. 335.

But directors' contracts for their own benefit are supported where the fiduciary relation was terminated before the contract was made, and also where the stockholders consent to, or ratify it. *Ashhurst's Appeal*, 60 Pa. St. 290; *Olcott v. Tioga R. Co.*, 27 N. Y. 546.

One who is president and a director of a railway does not sustain such a fiduciary relation to stockholders as will render voidable a purchase by him of the stock of the company from a non-official stockholder, made without disclosure by the president of the company's financial prosperity, and for less than the true value of the stock. *Board of Commissioners v. Reynolds*, 44 Ind. 509.

Nor are mere instruments of the company, who sustain no confidential relations to it within the rules applicable to fiduciaries. *Deep Rev. G. M. Co. v. Fox*, 4 Ire. Eq. [N. C.] 61; and see *Cook v. Berlin W. M. Co.*, 43 Wis. 447.

INTERNATIONAL AND G. N. R. R. CO., *MOSES TAYLOR ET AL.*

v.

PAUL BREMOND.

(53 *Texas Reports* 96. March 19, 1880.)

The consolidation of the Houston and Great Northern, and the International Railway companies, was unauthorized and wrongful as to a stockholder of the former company objecting thereto, and the same having been consummated by a wrongful appropriation of the stockholder's equitable interest, the consolidated company was equitably bound to him therefor.

The two railway enterprises differed so widely in their starting points, and the region of country to be traversed, that an original subscriber to the Houston and Great Northern Company might well object that he had not agreed to or authorized such a union, nor did he, by failing to object to a subsequent enlargement of the charter, which, whether it actually gave such power or not, did not, on its face, purport to give any power to consolidate, preclude

himself from objecting to a consolidation making so fundamental a change in the objects of the corporation.*

A stockholder in a railway company which, against his protest, has been consolidated without authority of law with another company, by the action of other stockholders, and whose equitable interest has been wrongfully appropriated by the consolidated company, cannot maintain an action for the injury against the directors of the company, as such; nor are the directors responsible to the corporation for a consolidation effected by act of the stockholders.

A stockholder in a railway company, against whose protest a consolidation was illegally effected by the company with another railway company, delayed for more than two years the institution of proceedings against the consolidated company for the appropriation of his equitable interests: *held*, that while the delay might preclude him from enjoying the further prosecution of the consolidated enterprise, it did not prevent him from following up his equitable interest in the hands of a corporation, which, by appropriating it without authority, became equitably bound to compensate him therefor.

A railway company, in an action against it by a stockholder for wrongful conversion of his interests, is not precluded by the erroneous estimates of its officials, embodied in a published report, from showing the true value of its assets.

APPEAL from Harris. Tried below before the Hon. James Masterson.

Suit by Paul Bremond, brought on the 3d day of December, A. D. 1875, against the Houston and Great Northern R. R. Co., the International and Great Northern R. R. Co., and against W. E. Dodge, Jacob S. Wetmore, Wm. M. Rice, C. Ennis, G. A. Grow, W. J. Hutchins, W. W. Phelps and C. E. Noble, seeking a recovery of sixty thousand dollars as his interest in the stock of the Houston and Great Northern R. R. Co.

He alleged that in 1870 he subscribed for \$100,000 stock in the Houston and Great Northern R. R. Co., paid on it all instalments ever demanded of him, aggregating \$40,000 paid up to 24th of November, 1871.

He alleged that the company was incorporated October 22, 1866, and that the individual defendants were its directors on the 1st day of January, 1874, and the company was, on that day, consolidated with the International R. R. Co., under the name of the "International and Great Northern R. R. Co.," and that said directors, without being properly authorized, transferred all of the assets, franchises and effects of his company to the new company, having constituted themselves directors in the new company.

He alleged this transfer and consolidation to be a conversion of his property; that it was procured by the directors by breach of trust, faith and confidence, and that the assets were received by the consolidated company in collusion with them.

*In the opinion of Associate Judge Gould, the policy of the state, now contained in the constitution, to forbid consolidation of parallel and competing railroads, was indicated in 1873 by like restrictions inserted in numerous charters, then granted; and it was not the design of the act of May 8, 1873, to depart from that policy and confer an unlimited power of consolidation.

He alleged that the company had large assets; that his interest was worth \$50,000; and claimed the recovery back of the instalments paid and interest thereon, or the value of his stock and interest in the company, from the defendants, all of whom, he alleged, fraudulently and collusively united to destroy and convert his property against his repeated protests.

Defendants answered with:

1. General demurrer.

2. General denial.

3. Admitted the consolidation, but justified the same on the following grounds, viz.:

That in 1871, the directors of the Houston and Great Northern R. R. Co. purchased the property franchises of the Houston Tap and Brazoria R. R. Co., which was an incorporation under the laws of Texas; that the purchase was approved by the stockholders in the company, including plaintiff, and that in the charter of the "Tap" was a provision that it might consolidate with any other company, by a vote of two-thirds of its stockholders.

That on the 8th day of May, 1873, the legislature of Texas passed an act consolidating the Houston and Great Northern R. R. Co. with the Houston Tap and Brazoria R. R. Co., by which it granted to the former all the franchises and privileges of the latter; that in the charter of the latter was a provision authorizing its consolidation with any other company. This, they claimed, passed to and was bestowed on the Houston and Great Northern R. R. Co. by this act.

4. They pleaded that the consolidation was effected by a vote of more than two-thirds of the stockholders, at a special meeting called for that purpose, September 27, 1873, and attached the proceedings of the meeting, showing the vote, and the articles showing the terms of the consolidation, which they justify, and plead that it has been ratified by the legislature.

5. They pleaded that as far back as February, 1872, articles of agreement to consolidate were in existence, and had been ratified by the stockholders, of the same purport as those of the actual consolidation, and they exhibited them, and that from that date on the two companies were operated as one consolidated company.

That plaintiff, knowing these things, and taking no steps to prevent it, was estopped to complain of them.

A jury was waived, cause submitted to the court, and judgment for appellee against appellants, for \$43,182.30, who gave notice of appeal.

The appellants severed in their assignments, and the directors, Wm. E. Dodge, J. S. Wetmore, Cornelius Ennis, Moses Taylor, Wm. M. Rice, and Galusha A. Grow, assigned errors, apparent from the opinion.

The Houston and Great Northern R. R. Co. was incorporated

by act of the legislature of Texas, on the 22d of October, 1866, for the purpose of constructing a railroad from Houston to Red river, passing as near Montgomery, Huntsville, Crockett, Rusk and Tyler as practicable.

No section of the charter contained authority to consolidate.

It was agreed that the Houston and Great Northern R. R. Co. consolidated with the International R. R. Co., and the consolidated company was called the International and Great Northern R. R. Co. and that "from about the first of January, 1874, the consolidation, merge and mingling, has been perfect as one road," and that "the road's assets, franchises and effects, and capital stock of the two companies, were from that time claimed, owned and used by the consolidated company."

It was further agreed that Paul Bremond, in 1870, subscribed for one thousand shares, of one hundred dollars each, in the stock of the Houston and Great Northern R. R. Co., and paid all calls made on him therefor, amounting to \$40,000 "paid up," by the 24th day of November, 1871.

Bremond protested against the consolidation repeatedly, verbally and by letter.

The International R. R. Co. was an incorporation under act of the legislature of Texas, of 5th of August, 1870, "and it was agreed that the only section of its charter, referring to the subject matter of this suit," is section 14, which does not seem to give that company the power to consolidate.

The directors of the Houston and Great Northern R. R. in 1872 and 1873, and at time of consolidation, were W. E. Dodge, Wm. M. Rice, G. A. Grow, Moses Taylor, Jacob S. Wetmore, C. Ennis, W. J. Hutchins, W. W. Phelps and C. E. Noble, until his resignation in September, 1873.

At a meeting of the board of directors, on the 19th of February, 1872, in New York city, at which appellants Taylor, Dodge, Wetmore and Rice were present, there was adopted an agreement to consolidate the Houston and Great Northern R. R. Co. with the International R. R. Co., and the officers were directed to execute the same, when the International should adopt them.

The articles of agreement began by suggesting the expediency of getting further legislative enactment to authorize consolidation, and postponed the consummation of it until such legislation could be obtained, or the impossibility of obtaining it ascertained; "but in the meantime, the interest of the two companies shall be considered one interest, and managed in view to such consolidation."

From that date the administration of the two companies should be one, each board to retain its own existence, the direction of the business of the two companies to be in the hands of a joint board.

The basis of consolidation was, that the stock of each company

was to be called in and cancelled, and \$5,000,000 of stock of the consolidated company issued to represent property of every description belonging to the joint companies, and divided by giving to the stockholders of the International twenty-three thousand four hundred and thirty shares, and to the Houston and Great Northern R. R. Co. twenty-six thousand five hundred and seventy shares.

From that date the earnings of the two companies should be considered as belonging to the joint companies, and the expenses as joint expenses, but the accounts and management of the funds should be directed as theretofore by the officers of the respective companies, until permanent consolidation was effected.

This agreement was signed by J. Sandford Barnes, president of the International, and defendant Grow, as president of the Houston and Great Northern R. R. Co.

The agreement was adopted, subject to the rejection of their stockholders, by a three-fourths vote.

Defendant Grow, in behalf of defendants, testified he was the president of both of the companies in the years 1872 and 1873, and up to the time of consolidation, and was president of the consolidated company from its existence till July, 1874. He never heard any talk of consolidation until he went to New York, immediately before the meeting of February 19, 1872.

The agreement of the 19th of February, 1872, was signed by him as president of the Houston and Great Northern R. R. Co., by direction and order of the board of directors. The articles in effect were an agreement for pooling the earnings of the two roads, and providing for operating them as one road, expenses to be joint expenses, receipts to be joint receipts, with one set of officers so as to save expenses of two. This agreement was entered into by the directors of the Houston and Great Northern R. R. Co., at a directors' meeting in the city of New York. Separate accounts were, however, to be kept by each road, until the two roads were actually consolidated, and the accounts were so kept. So soon as the agreement was executed, it was shown to the stockholders present, and to those in New York, for their approval. Nothing was done under the agreement until the assent to it by the stockholders, as reported to the stockholders' meeting in December, 1872. He showed the agreement to Mr. Bremond, and after reading it through, he expressed his disapproval and refused to give his assent. He had afterwards different conversations with Bremond, and he in all of them expressed his opposition to the consolidation. The two roads were run and operated under this agreement from about April 1, 1872, till September 27, 1873: "By changing the line of the road so as to intersect the International at or near Palestine, we cut off competition of the Trinity boats, and by making this agreement, competition between the two roads was prevented; and by using 50 miles of the track of the International we were enabled to reach

Tyler much earlier, and saved three-fourths of a million of dollars in outlay. Many of the stockholders were common to both roads, and others thought consolidation better to avoid expense and competition, and because of the lack of power to make a legal consolidation, they entered into this pooling business."

On all these considerations, the directors of the Houston and Great Northern R. R. Co. thought it wise, and thinking that they had no power to consolidate made this arrangement, intending to consolidate when they could.

Grow further testified that "at the time of the agreement by the directors, of Feb. 19, 1872, to consolidate the Houston and Great Northern R. R. Co., we had run a line east of the line to Palestine, and this line was changed by the directors with the view of consolidating with the international, which, for reasons here given, they thought desirable. We built the road to Palestine before submitting the articles of agreement to consolidate, made by the directors to a stockholders' meeting; never reported it to a stockholders' meeting until December, 1872, and the road was then built to Palestine. If consolidation was had, it was better to build to Palestine. If it had not been consolidated, that eastern line would have been built."

On the 29th of August, 1872, this board of directors, acting with the directors of the International R. R. Co., constituting a "joint board," decided to issue bonds to \$10,000 per mile, the principal and interest of each company to be guaranteed by the other company.

On July 15, 1873, the board of directors, present defendants Grow, Dodge, Rice, Ennis and Wetmore, passed a resolution accepting an act of the legislature of Texas, of May 8, 1873, entitled "An act to consolidate the Houston Tap and Brazoria Railway, the Huntsville Branch Railway, and Victoria and Columbia Railway with the Houston and Great Northern Railroad."

At the same meeting, the directors drafted and approved articles of consolidation of the capital stock and franchises of the Houston and Great Northern R. R. Co., with the capital stock and franchises of the International R. R. Co., subject to the ratification of the stockholders. They gave to the consolidated company the name of International and Great Northern R. R. Co., and conveyed to and vested in that company all the debts, effects, franchises, etc., of the two companies.

At the same meeting, they appointed three of their number, defendants Dodge, Taylor and Rice, a committee to name the members of the board of directors of this new company, who, on September 16, 1873, reported to the board of directors the names of all the board of the Houston and Great Northern R. R. Co., themselves included, as a part of the board of the new company.

On the 2d of September, 1873, the board of directors called a

special meeting of the stockholders of the Houston and Great Northern R. R. Co. to convene September 27, 1873, to consider the proposition of consolidating said road with the "International," under authority of the act of the legislature of May 8, 1873.

At this special meeting of the stockholders defendant Grow presided, and out of the sixty thousand shares of the company, there were present forty-four thousand five hundred and forty-seven, of which all but twenty-five voted for the consolidation, merging the Houston and Great Northern R. R. Co. with the International, and vesting all its assets in the new company. Bremond sent his protest to the meeting. At the conclusion it was resolved that until the organization of the new board the control and management of the two companies were continued as at that time. The defendants were named as a part of the new board.

At the annual meeting of the stockholders, December 22, 1873, the proceedings of the special meeting of September 27, 1873, were approved, and the articles of consolidation ordered printed, and it was again resolved that the management of the companies shall continue as at present, until the organization of the new board.

At the time the articles were made by the directors, on July 15, 1873, defendant Grow was president of both companies.

The basis of this consolidation of July, 1873, was, that the assets of the two companies should be represented by fifty-five thousand shares, thirty thousand of which the stockholders of the Houston and Great Northern R. R. Co. were to get, and twenty-five thousand the stockholders of the "International."

It was agreed that the defendant directors were the directors of the Houston and Great Northern Railroad at and up to the consolidation, and that they were a part of the board of the consolidated company, which, after consolidation, as directors of the consolidated company, took possession of the assets, franchises and effects, and managed and controlled both roads and their assets as one company, called the "International and Great Northern R. R. Co.," and that this was fully consummated on January 1, 1874.

On the 21st of July, 1874, the board of directors of the International and Great Northern R. R. Co. resolved that the \$5,500,000 of the capital stock of the consolidated company be executed, issued and distributed to the several stockholders of the two companies, at par, in exchange for the stock in the respective companies, on the basis of the agreement of February 19, 1873, instead of the agreement of July 15, 1873, voted on and passed by the stockholders as the basis of consolidation. The latter dividing the stock in the proportion of twenty-five thousand to thirty thousand, the former in the proportion of twenty-three thousand four hundred and thirty to twenty-six thousand five hundred and seventy.

The record does not contain any evidence of Bremond's protest against consolidation with the Houston Tap and Brazoria R. R. Co.

The action of the court below in precluding defendants from showing the real value of the assets of the Houston and Great Northern R. R. Co., is apparent from the opinion.

Thos. G. Shearman, with Baker & Botts, and Ballenger, Jack & Mott, for appellants.

I. The defendants, William E. Dodge, J. S. Wetmore, Cornelius Ennis, Moses Taylor, William M. Rice and Galusha A. Grow, as to them, say: "The judgment is erroneous, because the testimony does not show that they, as directors, did any act which of itself could or did affect the plaintiff's rights as a shareholder in the Houston and Great Northern Railroad." The claim to recover back the money paid by plaintiff, upon the ground that the subscription for stock was rescinded, is unquestionably a cause of action against the Houston and Great Northern R. R. Co., as a corporation, and against no one else. The directors of the corporation, as individuals, could not rescind this contract. By their votes, they might bring about such action of the corporation as would rescind, or entitle the plaintiff to rescind, the contract; but any act which had this effect must, of necessity, be the act of the corporation itself. "An action for injuries caused by misconduct of directors must be brought in the name of the corporation, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an action the corporation must necessarily be made a party defendant. When a stockholder brings such an action the complaint should allege that the corporation, on being applied to, refuses to prosecute; and as this averment constitutes an essential element of the cause of action, the complaint is defective and insufficient without it." *Greaves v. Gouge*, 69 N. Y., 154; *Smith v. Hurd*, 12 Metc., 371; *Allen v. Curtis*, 26 Ct., 456; *Peabody v. Flint*, 6 Allen, 52; *Craig v. Gregg*, 83 Pa. St., 19; *Hodsdon v. Copeland*, 16 Me., 314; *Rich v. Shaw*, 23 Me., 343; *Smith v. Poor*, 40 Me., 415. We call attention to the principle upon which these decisions are based, to wit, that a stockholder has no direct ownership in any part of the corporate property. All that he has is "a limited and qualified right to participate in a certain proportion in the benefits of a common fund, vested in a corporation for the common use." (a) "All sums which could be recovered" for "injury done to the capital stock by wasting and diminishing its value, * * * would be assets of the corporation; and it would be only after the debts were paid, and in case a surplus should remain, that the stockholders would be entitled to receive anything."

Shaw, C. J., *Smith v. Hurd*, 12 Metc., 371. (b) "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made." *Hyatt v. Allen*, 56 N. Y., 553, 557. (c) "The individual members of the corporation are, no doubt, interested in one sense in the property of the corporation, but in no legal sense are the individual members the owners." *The Queen v. Arnaud*, 9 Q. B., 806, 817. (d) "A shareholder has no interest in the property as such, or the profits as such." *Brown v. Collins*, L. R., 12 Eq., 586, 594; to same effect, *Van Allen v. Assessors*, 3 Wall., 573, 584; *Utica v. Churchill*, 33 N. Y., 228; *Bates v. McKinley*, 31 Beav., 280.

II. The plaintiff cannot in one action recover judgment against the corporation upon a cause of action for which it alone is responsible, and at the same time by showing that its assets have all been converted by the directors, compel them to apply the proceeds to the payment of his judgment. *Public Works v. Columbia College*, 17 Wall. 521; *Jones v. Green*, 1 Wall. 330; *Stewart v. Fagan*, 2 Woods, 215; *Marsh v. Burroughs*, 1 Woods, 463; *Crippen v. Hudson*, 13 N. Y. 161; *Reubens v. Joel*, id. 488; *Miller v. Miller*, 7 Hun, 208; *Hargrove v. Baskin*, 50 Miss. 194; *Haggerty v. Nixon*, 26 N. J. Eq. 42; *Davis v. Dean*, id. 436; *Ballou v. Jones*, 13 Hun, 629; *Briggs v. Oliver*, 68 N. Y. 336; *Clafin v. French*, 28 N. J. Eq. 383; *Griffin v. Nitcher*, 57 Me. 270; *Dewey v. Eckert*, 62 Ill. 218; *Newman v. Willetts*, 52 Ill. 98; *Weightman v. Hatch*, 17 Ill. 281; *Manchester v. McKee*, 9 Ill. 511; *McDowell v. Cochran*, 11 Ill. 31; *Heacock v. Durand*, 42 Ill. 230; *Hall v. Joiner*, 1 So. Car. 186; *Cubbedge v. Adams*, 42 Geo. 124; *Peyton v. Lamar*, id. 131; *Armstrong v. Keifer*, 39 Ind. 225; *Henderson v. Brooks*, 3 N. Y. Supreme Ct. 445; *Voorhees v. Howard*, 4 Abb. App. 503; *Bassett v. St. Albans Co.*, 47 Vt. 313; *Tyler v. Peatt*, 30 Mich. 63; *Farned v. Harris*, 11 Smedes & M. 366; *Wright v. Petrie*, 1 Smedes & M. Ch. 282; *Dick v. Truly*, id. 557; *Scott v. Wallace*, 4 J. J. Marsh. 654; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Dana v. Banks*, 6 J. J. Marsh. 219; *Wooley v. Stone*, 7 J. J. Marsh. 302; *Parish v. Lewis*, 1 Freeman (Miss.) Ch. 299; *Screven v. Bostick*, 2 McCord (S. C.) Ch. 410; *Clark v. Banner*, 1 Dev. & B. (N. C.) 608; *McDermot v. Blois*, R. M. Charl. (Ga.) 281; *Steward v. Stevens*, Harr. (Mich.) 169; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; *West v. McCarty*, 4 Blackf. (Ind.) 244; *Smith v. Thompson*, 1 Walker (Mich.) 1; *Barrow v. Bailey*, 5 Fla. 9; *Young v. Frier*, 9 N. J. Eq. 465; *Stone v. Manning*, 3 Ill. 530; *Maynard v. Hoskins*, 9 Mich. 485; *Grimsley v. Hooker*, 3 Jones (N. C.) Eq. 4; *Rice v. Barnard*, 20 Vt. 479.

The same rule prevailed in Alabama, Tennessee and Massachusetts until altered by statute. *Reynolds v. Welch*, 47 Ala. 200; *Roper v. McCook*, 7 Ala. 318; *Morgan v. Crabb*, 3 Porter (Ala.),

470; *M'Nairy v. Eastland*, 10 Yerg. (Tenn.) 310; *Taylor v. Robinson*, 7 Allen (Mass.), 253.

III. If the petition could be construed as making out a case in which the directors had exceeded the powers conferred upon them by the charter, and the action should be considered as brought by plaintiff as a stockholder, on behalf of other stockholders, it would still be fatally defective for want of any averment that application has been made to the corporation itself to sue, and that it has refused to do so; or that the corporation is entirely under the control of the directors in fault, and that they have some personal interest in sustaining their transactions *ultra vires*, which makes it morally impossible that they should permit the corporation to bring an action to set those transactions aside. 1. In England, it is held that the corporation must be made a party plaintiff, leaving the court to ascertain whether the corporate name ought to be used without the consent of the directors. *Duckett v. Gover*, 6 Ch. Div. 82; *McDougall v. Gardiner*, 1 Ch. Div. 13; *Gray v. Lewis*, L. R., 8 Ch. 1035. 2. In America, this rule is so far modified as to permit a stockholder to bring suit in equity on behalf of all similarly situated, making the corporation a defendant, and averring that the corporation itself is prevented from suing by the directors in charge. But some averment of this kind is vital to the cause of action. *Memphis v. Dean*, 8 Wall. 64; *Greaves v. Gouge*, 69 N. Y. 154; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Wilkie v. Rochester, etc.*, R. Co., 12 Hun, 242; *Brewer v. Boston Theatre*, 104 Mass. 378.

IV. It is well settled that directors, as well as other trustees, will be protected from responsibility for everything except profits made by them personally, even when they exceed their powers, and violate the charter of their corporation, if "it was a question on which, with all due care, they might have made an honest mistake," and especially if it appears "that they acted throughout by the advice of their counsel." *Spering's Appeal*, 71 Pa. St. 11; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Lexington, etc., R. R. Co. v. Bridge*, 7 B. Mon. 556; *Godbold v. Branch Bank*, 11 Ala. 191; *Turquand v. Marshall*, L. R., 4 Ch. 386; *Attorney General v. Exeter*, 2 Russ. 45. Compare *Robinson v. Smith*, 3 Paige, 222, 231.

V. The only cause of action which dissenting stockholders have, upon an *ultra vires* act, is in equity, and to compel restitution to the corporation, and not to themselves. That is exactly what is decided by the cases cited by the appellee, and which we give below. *Dodge v. Woolsey*, 18 How. (U. S.) 342; *Solomon v. Laing*, 12 Beav. 339; *Kean v. Johnson*, 1 Stockton, 407; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St., 169; *Abbot v. Amer. H. R. Co.*, 33 Barb. 578; *Jackson v. Ludeling*, 21 Wall. 624; *Robinson v. Smith*, 3 Paige, 222; *Taylor v. Miami Exporting Co.*, 5 Ohio, 168.

VI. "The court erred, as shown in bill of exceptions, in refus-

ing to allow defendants to prove that the estimated value of lands and county bonds, as set forth in the 'Statement of Assets and Liabilities,' made by the directors to the stockholders, was made without regard to the then market value of said assets, and that in fact said assets were then worth in the market far less than estimated in said report, because this was a question between parties in interest—between the owners; * * * it was competent for defendants to show that said values were in fact overestimated at the time, and were not intended as an estimate of the then market value of said assets." This evidence was excluded upon the sole ground that the statement of assets and values contained in the report put in evidence was conclusive. No other objection to the evidence can now be raised. *Marston v. Gould*, 69 N. Y. 220, 228. The only argument offered in support of this ruling is that "this estimate of assets was embraced in" a report which "was offered by the defendants as a part of the agreed facts, and was their own testimony, which they should not impeach." "The party calling a witness is not precluded from proving the truth of a particular fact by any other competent testimony, in direct contradiction to what such witness may have testified; and this, not only when it appears that the witness was innocently mistaken, but even when the evidence may collaterally have the effect of showing that he was generally unworthy of belief." *Thompson v. Blanchard*, 4 N. Y. 303, 311; *Coulter v. American Express Co.*, 56 N. Y. 585, 589; to same effect, *U. S. v. Watkins*, 3 Cranch C. C. 441; *Brannon v. Hursell*, 112 Mass. 63; *Stockton v. Demuth*, 7 Watts, 39; *Spencer v. White*, 1 Ired. Law (N. C.) 236; *Bradford v. Bush*, 10 Ala. 386; *Brown v. Wood*, 19 Mo. 475; *Norwood v. Kenfield*, 30 Cal. 393; *Wolfe v. Hauver*, 1 Gill, 84; *Swamscot Co. v. Walker*, 22 N. H. 457.

VII. "The court erred in rendering judgment for the plaintiff, because, from his knowledge of the agreement to consolidate, and the intention of the two companies to consolidate, and the non-action of the plaintiff in taking steps to prevent it until two years after the consolidation, and when it was impossible to separate their interests, the plaintiff is now estopped from complaining of said consolidation." The plaintiff's delay for three years to bring any suit is a bar to his claim. Mere protests, however continuous, will not suffice. "The continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be precluded." *Clegg v. Edmondson*, 8 De Gex. M. & G. 787. Three years delay in filing a bill to compel directors to refund money sused ultra vires, held sufficient reason for dismissing the bill entirely. *Stupart v. Arrowsmith*, 3 Smale & Giff. 176. Two years delay in a similar case, held fatal. *Burt v. British Nation, etc., Society*, 4 De Gex & Jones, 158; *Peabody v. Flint*, 6 Allen, 52. A less period held a bar to equitable relief.

Graham v. Birkenhead, etc., R. Co., 2 Macn. & G. 146; Great Western R. Co. v. Oxford, etc., R. Co., 3 De Gex, M. & G. 341.

VIII. The general power given to the Houston Tap Company to consolidate with any other railroad company, conferred an implied power upon every railroad corporation which might subsequently be created in Texas to consolidate with the Houston Tap Company, even though the charter of the other corporation contained no clause authorizing it to consolidate. Tomlinson v. Jessup, 15 Wall., 454; Schenectady, etc., P. R. Co. v. Thatcher, 11 N. Y., 102; Buffalo, etc., R. Co. v. Dudley, 14 N. Y., 336, 348; White v. Syracuse, etc., R. Co., 14 Barb., 559; Suydam v. Moore, 8 Barb., 258; Inland Fisheries v. Holyoke Co., 104 Mass., 446; State v. Maine, etc., R. Co., 66 Me., 488; Pacific R. Co. v. Renshaw, 18 Mo., 210. If it is said that corporations are only subject to general laws antedating their creation, and that the act of September 21, 1856, was a private law for the incorporation of a single company, we answer that the decision in the Prospect Park Railroad case (67 N. Y., 371), already cited, expressly holds that such a consolidation clause as was contained in the act of September 21, 1856, is general, and applies to all railroad companies. And it is well settled that a statute may be private and local in its main scope and design, and yet be general in some one or more sections, and that by reason of those sections it is to be regarded for all purposes as a general law. Bretz v. New York, 6 Robertson, 325; State v. Lean, 9 Wis., 279, 288; Clark v. Janesville, 10 Wis., 136, 178; Rochester v. Alfred Bank, 13 Wis., 432, 437; Heridia v. Ayres, 12 Pick., 334, 344; Rogers' Case, 2 Me., 303; White v. Syracuse, etc., R. Co., 14 Barb., 559, where a statute empowering a single company to borrow of all other railroad companies was held to be general and public. The omission of the plaintiff to distinctly object to the consolidation with the Houston Tap Company is sufficient to make that binding upon him, whether he affirmatively consented or not. In such a case stockholders are bound to protest distinctly and earnestly, or they will be bound by the action of the majority. Watts' Appeal, 78 Pa. St., 370, 394. The burden of proof is upon the plaintiff to prove his dissent and protest. North Carolina R. Co. v. Leach, 4 Jones Law, 340; Martin v. Pensacola R. Co., 8 Fla., 370. And, moreover, the plaintiff was bound to commence proceedings promptly to prevent or set aside this consolidation, if he objected to it. Mere protests, even though continual are not enough. Clegg v. Edmondson, 8 De Gex, M. & G., 787; Watts' Appeal, 78 Pa. St., 370, 394.

IX. The plaintiff was not, in any case, entitled to recover damages payable to him personally.

The consolidation of the two companies was either authorized by a constitutional law, or it was not. If it was so authorized,

the plaintiff has, of course, no right to complain, and has no cause of action against either the corporation or its directors. If it was not so authorized, then the consolidation which was attempted was absolutely void, and the plaintiff was not entitled to rescind his contract of subscription, nor to recover damages for his own use, but was entitled simply and only to a judgment declaring the consolidation void, and directing the parties to whom the assets of the Houston & Great Northern Company had been transferred to restore them to that company. Changes in the form or business of a corporation which are *ultra vires* do not release a subscriber to stock. His only remedy is to restrain or vacate the unlawful proceeding, and confine the corporation within its proper limits. *Hays v. Ottawa R. Co.*, 61 Ill., 422; *Central P. R. Co. v. Clemens*, 16 Mo., 359, 366; *Ottawa R. Co. v. Black*, 79 Ill., 262, 268; *Mississippi R. Co. v. Cross*, 20 Ark., 443, 452; *Danbury, etc., R. Co. v. Wilson*, 22 Conn., 435; *Ex parte Booker*, 18 Ark., 338; *Conn., etc., R. Co. v. Bailey*, 24 Vt., 465, 476. See *New Orleans R. Co. v. Harris*, *supra*; *Mississippi R. Co. v. Gaster*, 24 Ark., 97. Having shown, as we submit, that the plaintiff was not entitled to recover any damages on the ground of his rescission of his subscription, we respectfully insist that he cannot recover any damages for his own use, on the ground that assets of the company had been misapplied. The only party which, upon a construction of the evidence most favorable to the plaintiff, could recover anything, was the Houston and Great Northern R. R. Co. If its funds had been wasted and its assets misapplied, the judgment should have directed restitution to be made to it. The plaintiff personally could not recover damages for an injury done to the company. *Greaves v. Gouge*, 69 N. Y., 154; *Robinson v. Smith*, 3 Paige, 222; *Smith v. Hurd*, 12 Metc., 371; *Allen v. Curtis*, 26 Conn., 456; *Craig v. Gregg*, 83 Pa. St., 19.

Hutcheson & Carrington for appellee.

I. The consolidation of the Great Northern R. R. Co., of which plaintiff was a stockholder, with the International R. R. Co., on January 1, 1874, was *ultra vires* the charter under which he became a stockholder. *Green's Brice's Ultra Vires*, 516, 538, and note on pp. 539 to 545; 2 *Red. on Railways*, § 252, note 5; 4th ed., p. 575; 5th ed., p. 589; *Field on Corporations*, §§ 426, 429; *Peoria v. Mad. & I. R. R. Co.*, 21 How., 441; *Clearwater v. Meredith*, 1 Wall., 25; *Kean v. Johnson*, 1 Stock., 401. The testimony shows that this consolidation was procured by the directors, and all the assets, franchises and effects of the H. & G. N. R. R. Co., were transferred by them to the new company without compulsion, thereby destroying his property.

II. The facts show that all the acts promotng the consolidation had their origin with the directors, and, being outside of corporate

powers of the company, could not be ratified. Green's Brice's Ultra Vires, 570, 462, and note 411, 412; 1 Red. on Rail., § 130, p. 515, 4th ed.; Angell & Ames on Corp., § 393; Dodge v. Woolsey, 18 How., 343, 344; Peterson v. Mayor of N. Y., 17 N. Y., 454.

III. A part of the stockholders of a company have no power to take the property of the company from the hands of others; and no majority, however large, undertaking to do so, would discharge the directors of their trust to preserve the assets for all the stockholders. Field on Corporations, § 152, p. 170, § 155 (Dayton R. R. Co. v. Hatch, 1 Disney, 84); Perry on Trusts, §§ 285, 291; 922, 926-928; Green's Brice's Ultra Vires, 79, 339-40, note *; also p. 516; Hill on Trustees, 863-869; Gashwiler v. Willis, 33 Cal., 19, 23; Kean v. Johnson, 1 Stock., 407; Black v. Del. & R. C. Co., 9; C. E. Green, 455; Dana v. Bank of U. S., 5 Watts & Serg., 256; Bank of U. S. v. Dandridge, 12 Wheat., 113; Abbot v. Am. H. R. Co., 33 Barb., 582-3, 591; Conro v. Port Henry Iron Co., 12 Barb., 27; Peabody v. Flint, 6 Allen, 55-56; Brewer v. Boston Theatre, 104 Mass., 378; Lauman v. Lebanon Valley Bank, 30 Pa. St., 42.

IV. Before any majority could accomplish such diversion, they must have paid Bremond the value of his interest, to recover which he was therefore entitled to bring his suit against the directors and the receiving companies. Field on Corporations, § 155; Green's Brice's Ultra Vires, 542; Pierce on Am. Railroad Law, 89, note; Lauman v. Lebanon Valley Bank, 30 Pa. St., 46; Black v. Del. R. C. Co., 9; C. E. Green, 455.

V. It is not necessary to show actual fraud on the part of the directors; the unauthorized disposition and appropriation of the assets by them was a breach of trust which does not admit of an inquiry into actual bad faith or evil intention. Story's Eq. Jur., §§ 258, 307, 322; Aberdeen Railway Co. v. Blakey, 1 Macq., 461; G. & S. R. R. Co. v. Kelly, 77 Ill., 434-5; Dobson v. Rauny, 3 Sandf. Ch., 62; Solomon v. Laing, 6 Eng. Rail. Ca. (308), 236; 29 Cal., 19; 25 Wis., 552; 43 N. H., 453; 1 R. I., 212; San Diego v. San Diego Railway Co., 44 Cal., 115, 117; Abbott v. Am. H. R. Co., 33 Barb., 594.

VI. It is a breach of trust towards a stockholder in a joint stock incorporated company, established for a certain definite purpose by its charter, if the funds or credit of the company are diverted from such purpose, although the misapplication be sanctioned by a vote of a majority of the stockholders. Field on Corporations, §§ 172, 173; Dodge v. Woolsey, 18 How., (U. S.), 342, 347; Solomon v. Laing, 6 Eng. Rail. Ca. 231; Kean v. Johnson, 1 Stock., 407, 413, 417; Jackson v. Ludeling, 21 Wall., 624; Goodwin v. Cin. & W. C. Co., 18 Ohio St., 51; Abbott v. Am. H. R. Co., 33 Barb., 592-3.

VII. For this breach of trust in diverting the funds from the

chartered purposes of the company, and receiving the converted assets themselves the dissenting stockholders have a cause of action against them and the company participating with them in the conversion and breach of trust. *Angell & Ames on Corp.*, §§ 312, 392, 393, note 1; *Hill on Trustees*, [520]—[524]; *Field on Corporations*, §§ 172, 173, 398, 431; *Solomon v. Laing*, 6 Eng. Rail. Ca., 236; *Opinion of Lord Langdale*; *Taylor v. Miami Exporting Co.*, 5 Hammond, 168; *Kean v. Johnson*, 1 Stock., 424; *Dodge v. Woolsey*, 18 How. (U. S.), 343, 345; *Oliver v. Piatt*, 3 How. (U. S.), 333; *Koehler v. Black River Falls Co.*, 2 Black (U. S.), 915—16; *Jackson v. Ludeling*, 21 Wall., 624—635; *Robinson v. Smith*, 3 Paige Ch., 231; *Spearing's Appeal*, 71 Pa. St., 23; *Bissell v. The M. & S. R. R. Co.*, 22 N. Y., 275; *Watts' Appeal*, 78 Pa. St., 370; *Peabody v. Flint*, 6 Allen, 56, 57; *Frothingham v. Borneh*, 6 Hun, 366; *Dykeman v. Valiente*, 42 N. Y., 549.

VIII. The act of May 8, 1873, neither directly nor by implication gave any power to the Houston and Great Northern R. R. Co. to consolidate with the International Railroad. *Central R. R. Co. v. Georgia*, 2 Otto, 674—676; *Tomlinson v. Branch*, 15 Wall. 460; *Phil. & Wil. R. R. Co. v. Balt. & O. R. R. Co.* 10 How. 376; *The Delaware R. R. Tax*, 18 Wall. 226—228; *Morgan v. Louisiana R. R. Co.*, 3 Otto, 217; *Campbell et al. v. M. & C. R. R. Co.*, 23 Ohio St. 189; *State v. Greene Co. et al.*, 54 Mo. 551—2; *Moran v. Com. Miami Co.*, 2 Black (U. S.), 916; *Black v. D. R. R. C. Co.*, 9 C. E. Green, 474; *Commonwealth v. E. & N. R. R. Co.*, 3 Casey, 351; *Townsend v. Brown*, 4 Zab. 87; *Gould v. Langdon*, 43 Pa. St. 365; *Joint Cos. v. R. & B. D. R. Co.*, 1 C. E. Green, 372, 436; 7 Harris, 218; 9 Harris, 22; *Penn. R. R. Co. v. Canal Co.*, 21 Pa. St. 43.

IX. If such was the effect of the act of May 8, 1873, the legislature had no power, any more than the stockholders, to effect a consolidation till plaintiff had consented, or been paid the value of his interest, for it was a change of the fundamental purposes of the company. The original charter was passed the 22d of October, 1866, and defendant subscribed in 1870, and paid in \$40,000 before November 24, 1871. *Field on Corporations*, §§ 428—431; 2 *Redfield on Rail.*, § 221, note 12; 4th ed., pp. 332—333, and § 252, note 5; *Lauman v. Lebanon Valley Bank*, 30 Pa. St. 47; *Bailey v. State*, 16 Ind. 46; *Nashville R. R. Co. v. Jones*, 2 Cold. (Tenn.) 564; *New Orleans R. R. Co. v. Harris*, 27 Miss. 474; *Black v. Del. R. R. Co.*, 9 C. E. Green, 466; *Chapman v. Mad. C. R. R. Co.*, 6 Ohio St. 137.

X. The directors had no right to accept the act of May 8, 1873, nor did the stockholders, unless it was unanimous. *Field on Corp.*, p. 173, § 155; *N. O. & J. R. R. Co. v. Harris*, 27 Miss. 474.

XI. Both the amount of money contributed by plaintiff, and the value of the assets of the company at the time of the consoli-

dation, and the value of the stock before it was influenced by the consolidation, justify the amount of the judgment. Plaintiff subscribed for \$100,000 of stock in the Houston and Great Northern R. R. Co., and paid all calls made on him, amounting to \$40,000, by September 24, 1871. The assets of the Houston and Great Northern R. R. Co. consisted of sundry assets: \$2,863,330; two hundred and fifty-two miles of road, costing \$7,560,000, and \$3,600,000 of unpaid subscription, but as this was released he did not think it worth anything. The aggregate liabilities chargeable to the Houston and Great Northern R. R. Co. were: floating, \$1,360,249.11; first mortgage bonds, \$4,032,000, besides the convertible bonds issued by the joint board of the two companies, and guaranteed by each, and \$1,450,000 of these bonds were never sold, and still counted as assets of the company. The report of the directors to the stockholders, of December 22, 1873, stated a "surplus of assets over liabilities" of \$4,110,995, belonging to the two companies, but the witness Grow said he regarded these assets as overstated, and would not bring that price in the market. He then stated that the two hundred and fifty-two miles of road and equipments, costing \$7,560,000, would absorb the \$2,400,000 paid in on the subscription, the \$4,032,000 of first mortgage bonds, which sold at eighty cents, and only realized \$3,225,600, or would leave a balance of \$1,934,400 to be raised from the balance of the \$3,600,000 due on the stock and the sale of the second mortgage bonds, and net earnings of the road. Since the consolidation there has been built on the International line eighty miles of road; none has been built on the Houston and Great Northern line. Witness Grow did not know what has been done with the earnings of the Houston and Great Northern since the consolidation.

GOULD, ASSOCIATE JUSTICE.—It is the opinion of the court that the consolidation of the Houston and Great Northern and the International railroad companies was unauthorized and wrongful as to Bremond, an objecting stockholder of the former company, and having been consummated by a wrongful appropriation of his equitable interest by the consolidated company, that company became equitably liable to him therefor. All of the members of the court have not reached the conclusion that the consolidation was unauthorized, from the same premises and by the same process of reasoning, and it is not proposed to enter into an explanation of the reasons for that conclusion, further than to say: that we are all agreed, that the two railroad enterprises differed so widely in their starting points, their routes and the region of country to be traversed, that an original subscriber to the Houston and Great Northern might well object that he had not agreed to or authorized such a union; nor had he, by failing to object to a subsequent enlarge-

give the stock a market value. The inquiry should have extended to the actual value of stock, and as tending to show that value, the defendants were at liberty to show the true assets and liabilities of the Houston and Great Northern Railroad Company. It appears by bill of exceptions that an official statement of those assets and liabilities made by the president and directors in 1873 was by agreement read in evidence, and that the court refused to allow defendants to show whether said assets were then worth, or would have brought in the market, the price estimated in the report, the court holding the report conclusive, unless impeached for mistake in the pleadings. This action of the court is one of the errors assigned and urged.

Counsel for appellee replies that the evidence was in fact introduced, referring to the statement of facts. It does appear that the witness was allowed to state that those assets could not have been sold at the valuation put upon them in the report; but after this it also distinctly appears in the statement of facts that the witness was not allowed to testify as to the real value of these assets. Construing the bill of exceptions in the light of the statement of facts, we think it apparent that defendants were precluded from showing the real value of the assets of the Houston and G. N. Railroad Co., and we are of opinion that the exclusion of the evidence offered was erroneous. Surely the company or its present representative, the International and G. N. Railroad Co., is not precluded by erroneous estimates of its officials, though embodied in a published report, from showing the true value of its assets. This error of the court necessitates a reversal of the case.

On another trial, the inquiry should be as to the real value of Bremond's equitable interest in the Houston and G. N. Railroad Co. or the real value of his stock at the time the consolidation was practically effected; or at any period thereafter up to the institution of his suit. His recovery should not exceed that value, with interest, from the institution of the suit. The judgment is reversed and the cause remanded.

Reversed and remanded.

THE ATCHISON, COLORADO AND PACIFIC R. R. Co.

v.

THE BOARD OF COMMISSIONERS OF PHILLIPS COUNTY, et al.

(25 *Kansas Reports*, 261. *January Term*, 1881.)

The mere consolidation of one railroad company with another company since the taking effect of the act of March 1, 1870, authorizing the consolidation of such companies, will not discharge or release a non-assenting subscriber of stock.

After an election had been held in the municipal township of K., of Phillips county, in accordance with the provisions of "An act to enable counties, townships and cities to aid in the construction of railroads, and to repeal sec. 8, ch. 39 of the laws of 1874," approved February 25, 1876, and the amendments thereto, which resulted in authorizing the township of K. to subscribe to the capital stock of the Atchison and Denver Ry. Co. 180 shares of \$100 each, payable in bonds of the township, dollar for dollar, the county clerk of the county of Phillips made the subscription, in pursuance to the power conferred. On December 20, 1879, the company had completed $3\frac{1}{2}$ miles of main track and $\frac{1}{10}$ of a mile of side-track in the township, and the board of county commissioners then issued and delivered to the company \$13,000 of said bonds. On December 22, 1879, the Atchison and Denver Ry. Co., in accordance with the provisions of the act of March 1, 1870, consolidated with the Waterville and Washington R. R. Co., the Republican Valley Ry. Co., the Atchison, Solomon Valley and Denver Ry. Co., and the Atchison, Republican Valley and Pacific Ry. Co., under the corporate name of "The Atchison, Colorado and Pacific R. R. corporation." The latter extended the railroad in the township to make $6\frac{1}{10}$ miles. *Held*, That the township of K. was not released from the subscription for any part of the stock subscribed to the Atchison and Denver Ry. Co. by the consolidation after such subscription had been made. And held further, that the new corporation, as successor of the Atchison and Denver Ry. Co., is entitled to all the bonds to be issued under the subscription and the proposition submitted, not delivered prior to the consolidation.

The case of the State, ex rel. St. Job. & D. C. R. R. Co., v. Comm'rs of Nemaha Co., 10 Kas. 569, referred to, and distinguished.

Measure of Township Aid to Railroad Corporation. Where the proposition submitted under the law of 1876, and the amendments thereof, to the electors of a township for the subscription of stock and the issuance of bonds to aid a railroad corporation to construct its road from the east line of the township west to and into the city of K. (a place equidistant between the east and west lines respectively of the township), the terms of the proposition embrace aid to the corporation for all the main line and side-tracks built from the east line to and within the city of K. necessary for the efficient running and operating of the railroad; provided, however, in no case shall the total amount of the aid to the corporation exceed four thousand dollars per mile for each mile constructed in the township.

Original Proceedings in Mandamus.

Action begun in this court October 1st, 1880, to compel the issue and delivery of \$5,000 of bonds, being the remainder of the subscription of the township of Kirwin, in Phillips county, to the Atchison and Denver Ry. Co. The vote on the question of subscribing stock and issuing bonds therefor was had on April 15th, 1879; the subscription was made September 13th, 1879; the railroad was completed prior to June 1st, 1880. The proposition provided for aid to the amount of \$18,000 of bonds, with coupons attached. On December 20th, 1879, the Atchison and Denver Ry. Co. had completed $3\frac{1}{2}$ miles of main road and $\frac{1}{10}$ of a mile of side-track within Kirwin township, and on that day the board of county commissioners of Phillips county delivered to the company \$13,000 of the bonds of Kirwin township. On December 22d, 1879, the Atchison and Denver Ry. Co. consolidated with

certain other railway companies, and formed "The Atchison, Colorado and Pacific R. R. Co." The latter company, as successor of the Atchison and Denver Ry. Co., extended the line of the railroad from the point to which it had been built on the 20th day of December, 1879, so that before June 1st, 1880, there had been built more than six miles of railroad in Kirwin township. On June 7th, 1880, the plaintiff demanded of the board of county commissioners the issuance and delivery of the remaining ten Kirwin township bonds, amounting to \$5,000. These were refused. Hence this action. On March 1st, 1881, the following agreed statement of facts was filed in this court, to wit:

"1. For the purpose of this proceeding, and as all the facts in this case, it is agreed by and between the parties hereto that the said plaintiff is a railroad corporation duly chartered and organized under the laws of the state of Kansas, and formed by the consolidation of the following-named corporations, to wit: The Waterville and Washington R. R. Co., the Republican Valley Ry. Co., the Atchison, Solomon Valley and Denver Ry. Co., the Atchison, Republican Valley and Pacific Ry. Co., and the Atchison and Denver Ry. Co., (all of which companies were chartered under the laws of the state of Kansas,) and that the consolidation went into effect on December 22d, 1879, and has ever since said time been in full force and effect. And the said plaintiff is now and ever since said 22d day of December, 1879, has been the lawful successor in interest of each and all of the companies aforesaid, including the said Atchison and Denver Ry. Co.

"2. That the township of Kirwin, in the county of Phillips and state of Kansas, is and ever since March 1, 1879, has been a duly organized municipal township and corporation, comprising a territory of six miles square and co-extensive with the congressional township designated as number 5, range 16, west, in said county of Phillips, and that the city of Kirwin is situated equidistant between the east and west lines respectively of said township, in the southwest quarter of section 27, southeast quarter of section 28, northeast quarter of section 33, and the northwest quarter of section 34, and at said date the assessed value of the property of said township of Kirwin exceeded \$60,000, and ever since said date said valuation has exceeded said sum.

"3. That on March 1, 1879, and prior thereto, and from said time for and until the consolidation of the railroad companies hereinbefore referred to, the Atchison and Denver Ry. Co. was a duly chartered and organized railroad corporation under the laws of the state of Kansas, and authorized to build a railroad and telegraph line in connection with the Atchison, Solomon Valley and Denver Ry. at Cawker City, in Mitchell county, and following the general course of the north fork of the Solomon river and the head-waters of Prairie Dog, Sappa, and Beaver creeks, westwardly to the west

line of Sherman county, in the state of Kansas, in the direction of Denver, in the state of Colorado, through the counties of Mitchell, Osborne, Smith, Phillips, Norton, Decatur, Rawlins, Cheyenne and Sherman, in the state of Kansas.

"4. That on March 1, 1879, and from said time until the second Monday in January, 1880, Jacob N. Clere was the duly authorized chairman of the board of county commissioners of said county of Phillips, and N. W. Aplington and Molestes Fisher were the two other members of said board of county commissioners, and J. H. Laird was the duly authorized county clerk of said county of Phillips; but ever since said second Monday in January, 1880, said N. W. Aplington has been the duly authorized chairman of said board of county commissioners, and H. S. Granger and Molestes Fisher, the two other duly authorized members of said board of county commissioners, and said J. W. Lowe, the duly authorized county clerk of said county.

"5. That on March 10th, 1879, upon due proceedings had under the act of the legislature of the state of Kansas, entitled 'An act to enable counties, townships and cities to aid in the construction of railroads, and to repeal § 8, ch. 39, of the laws of 1874,' approved Feb. 25, 1876, and the amendments thereto, and on petition of more than two-fifths of the resident tax-payers of said township of Kirwin, the board of county commissioners of such county of Phillips duly ordered a special election to be held in said township on April 15th, 1879, to vote upon the proposition embraced in said order, in the words and figures following, to wit: 'It is ordered by the board of county commissioners of said county of Phillips, that the question of a subscription in behalf of said municipal township of Kirwin for 180 shares of \$100 each of the capital stock of the Atchison and Denver Ry. Co., and in payment therefor issuing to said railway company the thirty-six bonds of said township of the denomination of \$500 each, payable to bearer at the fiscal agency of the state of Kansas, in New York city, thirty years after the date thereof, bearing interest at the rate of eight per cent. per annum, payable annually, for which interest coupons shall be attached, payable at the fiscal agency aforesaid, shall be submitted for adoption or rejection to the qualified electors of said municipal township of Kirwin, at a special election to be held on the 15th day of April, 1879, at the usual voting-places in said township; said subscription of stock to be made and said bonds to be issued on the following terms and conditions, to wit: As soon as said proposition shall be determined in the affirmative by a canvass of the votes cast at said election, the board of county commissioners of said county of Phillips, for and on behalf of said municipal township, shall order the county clerk to make, and the county clerk shall make, said subscription in the name of said municipal township for said one hundred and eighty shares of the

capital stock of said railway company; and when the railroad of said railway company shall be built and completed, and in operation, by lease or otherwise, from Cawker City, in Mitchell county, in connection with the Atchison, Solomon Valley and Denver Railway, and the Central Branch Union Pacific Railroad, to and into the city of Kirwin, in Phillips county, and the freight and passenger depot and side-track, stock-yard, and terminal-station conveniences be built and constructed within the corporate limits of said city of Kirwin, and within a square 200 rods in extent, of which the public square in Kirwin shall be the centre, then said board of county commissioners shall cause such bonds with coupons attached, as aforesaid, to be issued in the name of said municipal township of Kirwin, and shall deliver the same to said railway company on delivery or tender to the treasurer of said municipal township of a certificate of said shares of the full-paid capital stock of said railway company, equal in amount with said bonds, dollar for dollar: Provided, said railway shall be built and completed, and in operation, by lease or otherwise, as aforesaid, from the Missouri river at Atchison, Kansas, to and into the said city of Kirwin, by and before the first day of June, 1880; and provided further, that if the railway of said railway company shall not be graded to a point within 20 miles of Kirwin, in the surveyed line of its extension to Kirwin, via Gaylord, in Smith county, Kansas, by or before December 31, 1879, then the said company shall forfeit and relinquish all of its right and interest in and to the bonds herein provided for; and provided further, that before the Atchison and Denver Ry. Co. shall be entitled to receive any of the bonds provided for, the said company shall file its written agreement with the township trustee of the township of Kirwin, that should the said company hereafter petition for and receive any of the bonds of the county of Phillips to aid in the construction of its railroad west from Kirwin, then in that case it will relinquish and pay over to the said township of Kirwin so many of the said county bonds as shall constitute a full and just equivalent, dollar for dollar, of the principal of the township bonds issued to said railroad company by the said township of Kirwin. All electors voting in favor of said proposition shall cast a ballot with the following words thereon: "For the subscription of stock and issue of bonds to the Atchison and Denver Ry. Co." All electors voting against said proposition shall cast a ballot with the following words thereon, to wit: "Against the subscription of stock and issue of bonds to the Atchison and Denver Ry. Co." It is further ordered by the said board of county commissioners, that at least thirty days' notice of said special election shall be given in the Kirwin Chief, a newspaper printed and published in said township of Kirwin, and of general circulation in said township and in the county of Phillips, and that the sheriff give the proper notice of

said special election by proclamation published as aforesaid, and posted up in three places in the township where the election is appointed to be held for at least thirty days next preceding said special election.'

"6. The said special election was duly ratified as required by law, and by said order of the board of county commissioners, and was duly held on said 15th day of April, 1879, and was duly carried in the affirmative by a vote of one hundred and forty-eight (148) in favor of and sixty-six (66) against said proposition; and on April 18, 1879, said board of county commissioners, as a board of canvassers, duly canvassed the returns of said election, and duly declared said proposition carried in the affirmative; and afterward, on the same day, said board of county commissioners duly ordered the county clerk of said county of Phillips to forthwith make a subscription in the name of said municipal township of Kirwin for one hundred and eighty shares of one hundred dollars each of the capital stock of said Atchison and Denver Ry. Co., subject to the terms and conditions contained in said order of submission; and that, upon full compliance by said railway company with the terms and conditions of said proposition, the chairman of the board and the county clerk make and execute said bonds for delivery to said railway company, in accordance with the terms of said proposition.

"7. That, on September, 13, 1879, said J. H. Laird, as said county clerk of said county of Phillips, in pursuance of authority in him vested by law and by the proceedings hereinbefore recited, made a subscription on the stock subscription books of said Atchison and Denver railway company, signed by his own proper hand, under the seal of the said county of Phillips, which subscription is in the words and figures following, to wit:

"In pursuance of the proposition submitted March 10, 1879, by order of the board of county commissioners of Phillips county, Kansas, to the electors of the municipal township of Kirwin, in said county, and an election held on the 15th day of April, 1879, and the further order of said board made on the 18th day of April, 1879, I, J. H. Laird, county clerk of said county of Phillips, do hereby subscribe, in the name and on behalf of said municipal township of Kirwin, for one hundred and eighty (180) shares of \$100 each of the capital stock of the Atchison and Denver railway company, on the terms and conditions of said subscription. Witness my hand and the official seal of said county of Phillips, at Phillipsburg, this 13th day of September, 1879.

[SEAL.]

(Signed)

J. H. LAIRD, *County Clerk.*

"8. On December 20, 1879, the Atchison and Denver railway company had constructed a railroad on the proposed line, and commenced to operate the same to and into the city of Kirwin; and

the said railway company having filed its written agreement, signed by R. M. Pomeroy, its president, with the township trustee of the said township of Kirwin, to the effect that should the said railway company hereafter petition for and receive any of the bonds of the said county of Phillips to aid in the construction of its road west of Kirwin, then in that case it would relinquish and pay over to the said township of Kirwin so many of the said county bonds as should constitute a full and just equivalent, dollar for dollar, for the principal of the township bonds issued to said railway company by the said township of Kirwin; and the said railway company having tendered to the treasurer of said Kirwin township a certificate for said one hundred and eighty shares of one hundred dollars each of the full-paid capital stock of said Atchison and Denver railway company; and the said Atchison and Denver railway company on said 20th day of December, 1879, had constructed a railroad, and the same was in operation from Cawker City, in Mitchell county, Kansas, in connection with the Atchison, Solomon Valley and Denver railway and the Central Branch Union Pacific railroad from the Missouri river, at Atchison, westwardly, to and into the city of Kirwin, in said Phillips county, Kansas, from the east line of the said township of Kirwin, and a freight and passenger depot, with side-track, stock-yard and terminal-station conveniences, were built and constructed in all respects in accordance with said proposition within the corporate limits of the city of Kirwin, in said township of Kirwin, and within a square 200 rods in extent, of which the public square in Kirwin is the centre, prior to December 20, 1879, and said railroad was graded and built on the surveyed line, via Gaylord, Smith county, Kansas; and that on December 20, 1879, there had been completed by said railway company, under said proposition and in accordance therewith, $3\frac{1}{4}$ miles of main track and $\frac{1}{10}$ of a mile of side-track; and after February 1, 1880, and before June 1, 1880, the said railroad was extended by the plaintiff, as the successor of said Atchison and Denver railway company, on said proposed line of said railroad from the point to which it had been built on the 20th day of December, 1879, so that before June 1, 1880, there had been duly completed more than six miles of railroad in said Kirwin township by said railroad company; and on the 20th day of December, 1879, the said Atchison and Denver railway company, by its attorney, David Martin, then and there requested said board of county commissioners, then duly convened in session, and the county clerk of said county of Phillips, to issue and deliver to it thirty-six bonds of the denomination of \$500 each, by virtue of the conditions contained in said proposition; but the said board of county commissioners issued and delivered to said railway company only twenty-six of the said bonds of the township of Kirwin, numbered from one to twenty-six, inclusive, amounting to \$13,000, and by order of said board the remaining ten bonds had

been signed by the chairman of said board, and signed by the said county clerk, and by him sealed, and were placed in the county treasurer's safe. The said railway company then and there refused to accept the said twenty-six bonds in compromise or as full payment of its claim under the proposition, but gave notice in open session of the board, that it would apply for the other bonds within the time allowed by the proposition for the full completion of the railroad and the improvements connected therewith; and full notice was then given that said company did not receive said bonds in full payment or compromise of its claim under said proposition, and said bonds were delivered with such notice.

"9. That prior to June 1st, 1880, the railroad of said railroad company as so consolidated was built and completed and in operation from Cawker City, in Mitchell county, Kansas, in connection with the Atchison, Solomon Valley and Denver railway, and the Central Branch Union Pacific railroad, to and into the city of Kirwin, in Phillips county, Kansas, from the east line of said township, and that a freight and passenger depot, with side-track and stock-yard, and terminal station conveniences, were built and constructed in accordance with said proposition, within the corporate limits of said city of Kirwin, in said township of Kirwin, and within a square 200 rods in extent, of which the public square in Kirwin is the centre, and prior to June 1st, 1880; and that the length of the main track of said railroad so completed and in operation in said township of Kirwin was and still is $6\frac{22}{100}$ miles, and the length of said railroad, including side-tracks, between the east line of said township of Kirwin and the west line of the city of Kirwin, was and still is $4\frac{22}{100}$ miles, and the length of the side-track in said city of Kirwin was and still is $\frac{1}{100}$ of a mile. On June 7th, 1880, the plaintiff, by its attorney and chief engineer, appeared before said board of county commissioners at a meeting thereof duly called and held, and made proof of all the foregoing facts, and of the tender of said stock certificate and of the filing of said agreement as hereinbefore recited, and the plaintiff then and there demanded of said board of county commissioners, the full board being present, and of said J. W. Lowe, the issue and delivery to it of the said ten Kirwin township bonds, amounting to \$5,000, so withheld as aforesaid, less the interest that had accrued from their date to said time, or the issue and delivery to it of said amount of new bonds; but said township being present by its attorney, objected, and thereon the board refused to issue or deliver said bonds or any of them, and the plaintiff then and there requested and demanded the delivery to it of eight (8) of said bonds, amounting to four thousand (\$4,000) dollars, so withheld as aforesaid, less the interest that had accrued from their date to said time, or the issue and delivery to it of said amount of new bonds, as the balance remaining due at the rate of \$1 00 per mile for the $4\frac{22}{100}$ miles and said side-tracks between the

eastern boundary of the county of Phillips and the township of Kirwin, and the western boundary of the city of Kirwin; but said township being present by its attorney, objected, and thereupon the board refused to issue or deliver said bonds or any of them; and the plaintiff then and there requested and demanded the delivery to it of three of said bonds, amounting to \$1,500, less the interest that had accrued thereon from their date to said time, or the issue and delivery to it of said amount of new bonds, as a balance remaining due at the rate of \$4,000 per mile for the $3\frac{1}{4}$ miles of main track between the eastern boundary of the county of Phillips and of the township of Kirwin and the western boundary of the city of Kirwin; but said township being present by its attorney, objected, and thereupon the board refused to issue or deliver said bonds or any of them, and said ten bonds or any of them have never been delivered to plaintiff, or any new bonds in lieu of them; although the plaintiff has fully complied with the terms of such proposition within the time therein limited.

"10. On December 20, 1879, at the time the said \$13,000 of Kirwin township bonds were delivered to said Atchison and Denver railway company, the said David Martin, as attorney for said railway company, tendered to the treasurer of Kirwin township a certificate of stock in due form, of which the following is a copy, to wit:

No. 17.

180 shares.

THE ATCHISON AND DENVER RAILROAD COMPANY.

State of Kansas.

SEALERS \$100 EACH. This certifies that the township of Kirwin, in Phillips county, Kansas, is entitled to one hundred and eighty shares of one hundred dollars each, of the capital stock of the Atchison and Denver railway company, transferable on the books of the company by said party or its attorney on surrender of this certificate.

In testimony whereof, the said company have caused this certificate to be signed by their president and treasurer, dated December 15, 1879.

[SEAL.]

R. M. POMEROY, *President*,
A. J. BARNES, *Treasurer*.

But the treasurer of said township then and there refused to receive said certificate of stock for an amount exceeding 130 shares of said stock, but upon assurance and the agreement of said attorney that said company would take up said certificate for 180 shares, and in lieu thereof have issued and delivered to said treasurer a certificate for 130 shares (the amount of said bonds that day delivered), the said treasurer, upon the conditions hereinbefore stated, received said certificate for 180 shares, and has since retained the same in his possession; but neither said attorney, nor said plaintiff, nor any one for it, has delivered said certificate for 130 shares. And said railway company has ever since neglected to take up said certificate of 180 shares and issue said certificate of 130 shares, although

requested so to do; and said treasurer is now and at all times has been ready and willing to deliver said certificate to plaintiff, upon demand therefor.

"It is also agreed that defendant was, previous to the commencement of this suit, tendered said certificate of 180 shares of stock to R. M. Pomeroy, president of the Atchison, Colorado and Pacific R. R. Co., as the successor in interest of the said Atchison and Denver Ry. Co., and demanded that there should be issued to defendant a certificate for 130 shares of said stock, which demand has not been complied with."

The opinion herein was filed May 3, 1881.

Everest & Waggener, for plaintiff.

A. G. McBride, for defendants.

HORTON, C. J.: The principal question for our determination is, whether the consolidation of the Atchison and Denver Ry. Co. with the Waterville and Washington R. R. Co., the Republican Valley Ry. Co., the Atchison, Solomon Valley and Denver Ry. Co., and the Atchison, Republican Valley and Pacific Ry. Co., under the corporate name of "The Atchison, Colorado and Pacific R. R. Co.," released the township of Kirwin from its subscription, September 13, 1879, to the capital stock of the first-named company. It is claimed by the defendants that, on December 22, 1879, the company to which the subscription was made went out of existence; that the construction of the railroad after December 22d was by an entirely different corporation; and that the plaintiff has no interest in the original contract for the construction of the railroad through Kirwin township, or in the subscription of that township to the stock of the Atchison and Denver Ry. Co. The case of *The State, ex. rel. St. Jos. and D. C. R. R. Co., v. Comm'rs of Nemaha Co.*, 10 Kas. 569, is cited as decisive. That case is not controlling as to this. There no subscription had been made to the stock of the company to which the bonds had been voted. There the law authorizing consolidation expressly reserved to each stockholder of the old companies the right to determine whether he would become a stockholder in the new corporation. Chapter 44 of the statute of 1865, under which the Northern Kansas R. R. Co. and the St. Joseph and Denver City R. R. Co. were consolidated into a single corporation on October 9, 1866, was abrogated by the adoption of the statute of March 1, 1870, and the proviso of the law of 1865, for dissenting stockholders to withdraw upon the consolidation of the companies was omitted in the law of 1870. (Laws 1870, ch. 92, pp. 195, 197.) The question resolves itself into one of power on the part of the legislature to authorize the consolidation of companies under the provisions of the law of 1870. The doctrine that, after a subscription has been made to the capital stock of a corporation, a material change of the charter

by which a new and different business is superadded to that originally contemplated, or its purpose and powers altered, releases a non-consenting stockholder, is limited by a provision in the charter authorizing a change or amendment, and in this state by § 1 of article 12 of the constitution of the state, which provides that corporations may be created under general laws; but all such laws may be amended or repealed, and the statutes enacted under such constitutional provision. The law of 1870 regarding the consolidation of railroads was in force at the dates of the election and of the subscription to the stock of the Atchison and Denver Ry. Co., and such subscription was made under the express provision of the law that the company might be consolidated with other companies at the instance and approval of parties representing two-thirds of all the stock of the corporations so consolidated. Paraphrasing the remarks of Mr. Justice Strong, in *Nugent v. Supervisors*, 19 Wall. 249, 251, when the voters of Kirwin township sanctioned a subscription by their vote, and when the subscription was made by the county clerk in pursuance of that sanction, they were informed by the law of the state that a consolidation with another company might be made, that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies, they made the contract. The subscription was therefore made subject to the contingency of the consolidation. There is no claim that the consolidation was prejudicial to the township's interests or those of the Atchison and Denver Ry. Co.; nor is any fraud or wrong alleged in such consolidation. The legislature has the power to authorize such consolidations, at least in all cases where the rights of a stockholder are not injured thereby. We conclude that the consolidation did not exonerate the original stockholders of the companies from their liability to pay their subscriptions, and therefore that it did not release the township of Kirwin from its subscription to "The Atchison and Denver Ry. Co." (*Nugent v. The Supervisors*, *supra*, and cases cited; *The Cork & Youghal R'y Co. v. Patterson*, 37 Eng. L. and Eq. 398; *Nixon v. Brownlow*, and *Nixon v. Green*, 3 H. & N. 686; *Sparrow v. R. R. Co.*, 7 Porter [Ind.] 369; *Bish v. Johnson*, 21 Ind. 299; *Hanna v. Cincinnati & Ft. Wayne R. R. Co.*, 20 Ind. 30.) "The Atchison, Colorado and Pacific R. R. Co.," after December 22d, 1879, was the lawful successor in interest of the company to which the bonds were voted and the stock was subscribed.

Some objection is made to the delivery of the bonds, on the ground that as the construction of $3\frac{1}{8}$ miles and $\frac{1}{16}$ of a mile of side-track of railroad brought the road to and into the city of Kirwin on December 20, 1879, the construction of more railroad within the city of Kirwin after that date does not support the

demand for the delivery of the remaining ten bonds. The objection is not well taken. The proposition provided that the railroad was to be completed and in operation before June 1, 1880; under its terms there was completed on December 20, 1879, $3\frac{1}{2}$ miles of main track and $\frac{1}{10}$ of a mile of side-track. Now the agreed statement of facts sets forth:

"That prior to June 1, 1880, the railroad of said railroad company, as so consolidated, was built and completed and in operation from Cawker City, in Mitchell county, Kansas, in connection with the Atchison, Solomon Valley and Denver Ry., and the Central Branch Union Pacific Ry., to and into the city of Kirwin, in Phillips county, Kansas, from the east line of said township; and that a freight and passenger depot, with side-track and stock-yard and terminal-station conveniences, were built and constructed in accordance with said proposition within the corporate limits of said city of Kirwin, in said township of Kirwin, and within a square of 200 rods in extent, of which the public square in Kirwin is the centre, and prior to June 1, 1880; and that the length of the main track of said railroad so completed and in operation in said township of Kirwin was and still is, $6\frac{22}{100}$ miles; and the length of said railroad, including side-tracks, between the east line of said township of Kirwin and the west line of the city of Kirwin was and still is $4\frac{22}{100}$ miles; and the length of the side-track in said city of Kirwin was and still is $\frac{22}{100}$ miles."

There is no claim that any of the road constructed within Kirwin city was unnecessarily constructed, and the contract to build to and into the city of Kirwin permitted the company to complete the necessary main and side-tracks within the city. Under the proposition submitted, the aid voted was for the railroad within Kirwin township to and into the city of Kirwin, and this included all the road and side-tracks in said township and to and into (within) the city of Kirwin necessary for the efficient running and operating of the road, with the statutory limitation that in no case should the total amount of the aid exceed four thousand dollars per mile for each mile of railroad constructed in the township. (Sec. 1, ch. 107, Laws 1876, as amended by § 1, ch. 142, Laws 1877.)

The bonds demanded do not increase the aid in excess of four thousand dollars per mile for each mile of road constructed under the proposition or contract, and the plaintiff is entitled to all of them. There is no element of estoppel in the conduct of the Atchison and Denver Ry. Co. or the plaintiff. The Atchison and Denver Ry. Co. made a demand for all the bonds December 20, 1879, but refused to receive the said twenty-six bonds in compromise of, or as the full payment of its claim under said proposition, and gave notice that it would apply for the other bonds within the

time allowed by the proposition for the full completion of the railroad and the improvements connected therewith. And full notice was given that the railroad did not receive said bonds in full payment or compromise of its claim under said proposition. Its successor extended the track within Kirwin city, and demanded the remainder of the bonds according to the notice.

A peremptory writ will be directed to issue for defendants to deliver the additional ten bonds of the denomination of \$500 each. All the Justices concurring.

BENJAMIN A. STRANGE

v.

H. AND T. C. R. R. Co.

(58 *Texas Reports*, 162. March 23, 1880.)

A certificate of stock in an incorporated company, contained a recital on its face that it was transferable by assignment, and on its surrender to the directors a new certificate of proprietorship would be issued to the assignee. The by-laws authorized transfers of stock, in writing, by the owner thereof, indorsed on the certificate, or on separate paper; and on the delivery thereof to the secretary, together with the original certificate of stock, for registration, new stock would be issued to the assignee. The assignee of the original stockholder, having possession of the original certificate, sued the company for the value of new stock issued to a subsequent assignee of the original holder to whom new stock had issued, without presentation of the original certificate. The plaintiff had not presented his transfer and stock at the secretary's office before the new stock issued. *Held*:

1. The company was estopped from denying that it would hold for the benefit of the holder of the certificate the amount of stock therein specified, until it was presented for cancellation and new stock issued.

2. The non-production of the original certificate of stock was notice to the company that a superior title might be in a third party.

3. Though the certificate was not the share of stock, it was constituted by the company the visible representative of it, and as between the shareholder and his assignee, the equitable, if not the legal, title would pass by a transfer of the certificate, and this, without it being recorded on the books of the company.

4. The certificate and transfer were prima facie sufficient to authorize the holder to demand of the company the privileges and benefits to which the original holder was entitled.

5. In the absence of a charter or statutory provision requiring a transfer of stock on the books of the company, as between the shareholder and his assignee, to pass title as against a creditor, the interest of the creditor must be regarded as subordinate to that of the bona fide assignee.

6. The company was liable to the assignee of the original stockholder holding the original certificate.

The owner of a certificate of stock in an incorporated company, placed his certificate, with a blank transfer indorsed thereon, in the hands of

another for the purpose of sale ; the agent filled the blank with his own name and afterwards indorsed thereon a transfer from himself to a purchaser.
Held :

1. The original owner having given to his agent possession of the certificate with the external indicia of ownership and the right of disposal, the subsequent transfer by the agent clothed the purchaser with the apparent legal title.

2. The rights of the purchaser did not depend on the actual title or authority of the agent to sell, but upon the act of the original owner giving the apparent authority of disposal, and which would estop him and his assignee.

3. The title of the purchaser would be subject to be defeated by a superior title in the original owner, if acquired with notice of it, or without valuable consideration.

4. In the absence of statutory or charter provision, the books of the company could not operate as notice of the ownership of the stock, further than for the use and benefit of the company itself.

Error from Harris. Tried below before the Hon. James Masterson.

The facts necessary to a proper understanding of the opinion will be found contained in it.

Stewart & Barziza, for plaintiff in error.—We contend that the written stipulations and conditions, as set forth in the original certificate of stock, ought to be strictly complied with by the officers of defendant. They are presumed to know more about the charter of their company and the rules set up in their certificates of stock than any other person ; and if anybody ought to suffer, it ought to be themselves.

These remarks, let it be remembered, are not made solely because it appears that two officers of this company have been dealing in this stock to the prejudice of plaintiff, but are meant to urge the principle, that as the new certificate of stock to Mr. Richardson which was issued, and as the new certificate to Mr. Hutchins which was issued, their acts were done by the officers of the defendant, who are presumed to know the charter of the company, and the stipulations in the company's certificate. Therefore we say, that it is not a question so much of an innocent purchaser (upon which we could confidently claim) as of principle and right and plain and common justice and law.

It is like a negotiable instrument which is not due ; it may be assigned ; the holder thereof is presumed to be the owner for value if it is indorsed to him ; the holder for value of that paper without any assignment stands in a better condition than does the one who claims to be an assignee upon another piece of paper and not possessing the original.

We contend that the holder and owner for value of that original certificate of stock, could and can, at any time, demand the same or its value, and cannot be affected with notice of any transfers or transaction had and made upon the books of said company, or

by its officers. And we contend that the issuing of another certificate to Richardson, while the original was out, was utterly void as to the owners of the original; and that the issuance of the certificate to Hutchins was utterly void as to the owners of the original, and that the owners and holders of such original can, at any time, claim their rights.

F. Barnard also for plaintiff in error :

I. The transfer by assignment in writing, and delivery of the certificate for said stock by Browder to Fletcher, and by Fletcher to Coryell, and by Coryell to Strange, divested Browder of all title and right to said stock. Pasch. Dig. 222; *Durat v. Swift*, 11 Tex. 140-279; *Angell & Ames on Corp.* 564, and cases cited.

II. The issuance by defendant of a second certificate for the stock, in lieu of the certificate issued to Browder, without the return and delivery of the Browder certificate, did not affect or impair the right and title of the assignee and holder of the Browder certificate under transfer in good faith, without notice of adverse claims by Browder, or his second transfer.

III. The terms of the certificate and the by-laws of the defendant company bound it to recognize plaintiff as the owner of the stock, and the defendant was estopped from issuing a new certificate to Hutchins, and plaintiff ought to have had judgment for the stock or the agreed value thereof.

IV. Where a party delivers a certificate of stock, with the assignment thereof in blank, to an agent, to be sold or disposed of, a purchaser of such stock, with or without notice of the agency, takes a good title, and is not bound for the proper application of the purchase money. *Kottright v. Buffalo Com. Bank*, 14 Md. 299.

Baker & Botts for defendant in error.—As counter propositions to the propositions made by plaintiff in error, we make the following :

I. Certificates of stock are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member as between him and the corporation.

II. The certificate is merely the evidence of his interest, as the title deeds are of title to the land, but not of the possession. *Griffin v. Howell*, 5 Barr, 77.

III. When Browder sold to Merriman, Fletcher held the certificate with power to sell; but the transfer of Browder to Merriman was a revocation of the power of sale previously given to Fletcher, and its filing in the office of the company was notice to the world. The community interested have the same notice of transfers registered as they have of deeds of lands recorded. After the date of Browder's sale, the sale of Fletcher was unauthorized, and an un-

authorized sale, although for a valuable consideration, and without notice, vests no higher title in the vendee than was possessed by the vendor. Browder transferred to Fletcher as his agent to sell in 1867; Browder sold to Merriman in 1868; the transfer to Merriman filed in the office of company in 1871, and Fletcher's sale to Coryell in 1873. *Dodd & Co. v. Arnold*, 28 Tex., 97; *Saltus v. Everett*, 20 Wend., 275; *Prescott v. De Forrest*, 16 Johns., 159; *Wheelwright v. Depeyster*, 1 Johns., 471; *Williams v. Merle*, 11 W. R., 80; *Brower v. Peabody*, 13 N. Y., 121.

IV. Certificates of stock are not negotiable instruments, so as to come within the rules of bills of exchange and promissory notes. No rules which belong to negotiable securities belong to them. *Railroad Co. v. Howard*, 7 Wall. (U. S.), 415; *Wilson v. Little*, 2 N. Y., 447; *Mechanics' Bank v. N. Y. & N. H. R. Co.*, 13 N. Y., 625; *Weaver v. Borden*, 49 N. Y., 288; *Dustin v. Livingston*, 9 J. R., 96; *Arnold v. Ruggles*, 1 R. I., 165.

George Goldthwaite also for defendant in error.

BONNER, ASSOCIATE JUSTICE.—This case is one of first impression in this court, and we have endeavored to give it that full consideration in the light of authority, consistent with the pressure of other business, which its importance demands.

It involves the question of the liability of a railroad company for damages for having issued new shares of stock to one claiming under the first shareholder, when the original certificate is still outstanding in the hands of an innocent third party, but who had not presented the same, with his transfer, to the office of the company, previous to the issuance of the new stock.

To determine the liability of the company, to some extent necessarily involves the merits of the respective titles of the two claimants, though but one is before the court.

The original certificate of stock issued on April 1, 1861, to J. M. Browder, and reads as follows:

"HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

"No. 19. Four shares.

"This certifies that J. M. Browder, proprietor of share No. 917 in the capital stock of the Houston and Texas Central Ry. Co., established by acts of incorporation passed by the legislature of the state of Texas, subject to which, and the by-laws, this certificate is transferable by assignment, and upon surrender hereof to the directors a new certificate of proprietorship of said share will be delivered to the assignee."

Plaintiff Strange holds possession of this original certificate for a valuable consideration, under the following chain of title:

1. A transfer from J. M. Browder, the original grantee, to E. S. Fletcher, dated March 14, 1862. 2. A transfer from E. S.

Fletcher to J. R. Coryell, dated May 10, 1873. 3. A transfer from J. R. Coryell to plaintiff B. A. Strange, dated August 29, 1873.

The title under which Hutchins holds the new stock is as follows:

Browder sold and transferred said certificate of stock on May 6, 1868, for valuable consideration, to C. H. Merriman. In pursuance of said assignment from Browder, Merriman transferred the stock on the books of defendant's company to A. S. Richardson, and certificate of the stock was issued to Richardson on July 27, 1868, and afterwards Richardson transferred the stock to W. J. Hutchins, on or about January 14, 1871. The certificate to Richardson was surrendered, and a new certificate for the same stock was delivered to Hutchins, who holds and represents the stock in defendant's company.

The by-law of the company authorized by its charter, upon the subject of the transfer of stock, reads:

"Section 4. The transfers of any share may be made by an instrument in writing signed by the owner, which writing may be indorsed on the certificate or made on a separate paper. The assignee must cause his transfer to be presented and delivered to the secretary of the company before it will entitle him to be recognized as the owner; and upon presentation of such transfer, with the certificate of stock, the secretary shall record the same in books to be kept for that purpose and called 'Report of Transfers,' and the president and secretary shall issue new certificate or certificates to the assignee as he may be entitled, unless they have notice of fraud or invalidity of said transfer."

Subsequently to the issuance of the new stock to Hutchins, a demand was made upon the company by the plaintiff, Strange, for the issuance of stock to him, he having presented the original certificate with the transfer to himself, which demand was refused. On the trial below a jury was waived and judgment rendered by the court for the defendant, the R. R. Co.

From the above statement, it will be seen that the original certificate of stock was transferable by assignment, either indorsed on the certificate itself or on a separate piece of paper, and was not required to be made, as in some cases, on the books of the company.

By the terms of the certificate and by-law, there was a continual affirmation made by the company, that they would hold, for the use and benefit of the rightful owner of the certificate, the amount of stock therein specified, until it was presented at the office of the company for cancellation and new stock issued; and the company was estopped from denying this. *Holbrook v. Zinc Co.*, 57 N. Y., 616; *In re B. & San F. Ry. Co.*, E. L. R., 3 Q. B., 584.

The company is to a certain extent the custodian of the rights of the stockholders, and is responsible for an illegal issuance of

stock to their prejudice. *Bayard v. Bank*, 52 Pa. St., 234; *Lowery v. Bank of Baltimore*, Taney's C. C. R., 310; *Bank v. Lanier*, 11 Wall., 369; *Salisbury Mills v. Townsend*, 109 Mass., 121; *Pratt v. The Taunton Copper Co.*, 123 Mass., 110; *Lorings v. Salisbury Mills*, 125 Mass., 150; *Bridgeport Bank v. R. R. Co.*, 30 Conn., 231; *R. R. Co. v. Schuyler*, 34 N. Y., 30.

It is not intended by this, however, to prescribe an arbitrary rule, that the company shall, in any event, without being in default as by negligence or fraud, be liable for the issuance of stock to any other party than the holder of the certificate, but that it takes the risk, if issued without due precaution, that the certificate may be presented by some one having the superior title.

The non-production of the original certificate of stock was notice to the company that such superior title might be in a third party. *R. R. Co. v. Schuyler*, 34 N. Y. 81; *Bayard v. Bank*, 52 Pa. St., 235.

A provision for the record of the transfers of certificates, to be made upon the books of the company, as required by the Act of December 19, 1857 (Pasch. Dig., art. 4909), was intended for the benefit of the company, so that it might know, by ready reference, who were legal shareholders, who were entitled to vote at its meetings, receive dividends, etc., and to whom it could safely issue new stock. *Bank v. Kortright*, 22 Wend., 362; *Broadway Bank v. McElrath*, 2 Beasley (N. J.), 26.

Although the certificate was not the share of stock itself, it was what the company constituted the visible representation of it; and as between the shareholder and his assignee, the equitable, if not the legal title to the stock, would pass by a transfer of the certificate, and this without it being recorded on the books of the company. *Angell & Ames on Corp.*, §§ 353-4; *id.*, § 564; *R. R. Co. v. Schuyler*, 34 N. Y., 30; *McNeil v. Bank*, 46 N. Y., 331; *Latch v. Wells*, 48 N. Y., 592; *Bank v. Kortright*, 22 Wend., 362; *Turnpike Co. v. Ferree*, 2 C. E. Green (17 N. J.), 118; *Bank v. McElrath*, 2 Beasley (13 N. J.), 24.

Such certificate and transfer is *prima facie* sufficient to authorize the holder to demand of the company the privileges and benefits to which the original holder would be entitled.

This construction of the legal effect of a certificate of stock and its transfer, is now required, almost as a matter of necessity, both for the benefit of corporations and of trade, since stocks in incorporated companies have become such an important basis for speculation and collateral security. To hold otherwise would virtually withdraw such stocks from all other than the home market.

Thus it will be seen that the rights of a bona fide holder of a certificate of stock are two-fold in their character. As against the shareholder, he would, whether his transfer be recorded on the books of the company or not, have a good title; as against the com-

pany, to enable him to demand that he be recognized as a shareholder, and entitled to its rights and privileges, he should present his certificate and transfer for record in the office of the company. *R. R. Co. v. Schuyler*, 34 N. Y., 80.

There is a class of cases in which it is held that shares of stock cannot be assigned simply by delivery and transfer of the certificate, unless made on the books of the company, so as to defeat the rights of an attachment or execution creditor without notice, by levy at the office of the company.

These cases generally turn upon some particular provision of the charter or upon some statute providing for such levy.

In the absence of some such positive provision, which would make a transfer on the books of the company an essential condition, as between the shareholder and his assignee, to pass title as against such creditor, it is believed that, by reason of the policy which favors the unrestrained transfer of shares of stock, the interest of the creditor should be subordinate to that of such bona fide assignee; and particularly, as otherwise such assignee would virtually be without remedy, if the company could protect itself under the levy and sale. *Broadway Bank v. McElrath*, 2 Beasley (N. J.), 24.

Browder, the original shareholder, testified that he placed his certificate of stock, with a blank transfer executed by him thereon, in the hands of Fletcher, for the purpose of effecting a sale.

Having thus given to Fletcher possession of the original certificate with the external indicia of ownership and the right of disposal, Fletcher's subsequent sale of it, under which plaintiff Strange claims, clothed him with the apparent legal title.

The rights of Strange, if bona fide, do not depend upon the actual title or authority of Fletcher to sell, but upon the act of Browder giving the apparent authority, and which would estop him and his assignee. *Saltus v. Everett*, 20 Wend., 278; *McNeil v. Nat. Bank*, 46 N. Y., 325; *Bridgeport Bank v. R. R. Co.*, 30 Conn., 231; *Turnpike Co. v. Ferree*, 2 C. E. Green (N. J.), 117; *Holbrook v. Zinc Co.*, 57 N. Y., 617.

The title of Strange, however, was subject to be defeated by a superior title in Browder or his assignee, if it could be shown that Strange purchased either with notice of it, or without paying a valuable consideration therefor.

It is uncontradicted both that Strange was a purchaser for value and without actual notice, and it remains to inquire whether he can be charged with constructive notice.

So far as it appears, either from any public statute or the charter or any authorized by-law of the company, the books of the company are not made to operate as notice of ownership further than for the use and benefit of the company itself.

As held by Chief Justice Taney, in *Lowery v. Bank of Baltimore*,

a purchaser of stock is not bound to look beyond the certificate or to examine the books of the corporation, to ascertain the validity of a transfer, as a different rule would greatly impair the value of stock, and would seriously disturb the usages of trade and the established order of business. *Taney's C. C. R.*, 310; *Salisbury Mills v. Townsend*, 109 Mass., 115.

Hence these records are not constructive notice to third parties dealing in certificates of stock, and were not such notice to Strange.

On the contrary, it may be said that the company, by the terms of the certificate to Browder and of their own by-law, were by the non-production of this certificate at the time they issued the new stock to Richardson, and who seems to have been its secretary, charged with notice that the original certificate was outstanding and may have then already passed, or might subsequently pass, into the hands of an innocent holder for value. This, we think, was, under the evidence in this case, such a dereliction of duty on the part of the company, and such breach of its contract, as contained in the certificate which it had permitted to be thrown upon the market, and to which it had invited confidence, as to make the company responsible to Strange, who held the possession of it, by the older title, for a valuable consideration and without notice of any defect.

We are of opinion that under the law as applied to the evidence, there was an error in the judgment for which it should be reversed and the cause remanded.

Reversed and remanded.

Chief Justice Moore dissenting.

SHIPLEY

v.

THE CITY OF TERRE HAUTE ET AL.

(74 *Indiana Reports*, 297. *May Term*, 1881.)

A city, having subscribed to the stock of a railroad company, under the act of May 4th, 1869, authorizing cities to aid in the construction of railroads, 1 R. S. 1876, p. 299, is bound by the same liability which under section 38 of the act for the incorporation of railroad companies, 1 R. S. 1876, p. 712, attaches to an ordinary stockholder in such company for labor done in the construction of its road.

Section 38 of said act for the incorporation of railroad companies is

constitutional, its provisions being matter properly connected with the subject of the title of such act within the meaning of section 19, article 4, of the constitution.

From the Vigo Circuit Court.

W. Eggleston and N. G. Buff, for appellant.

T. W. Harper, for appellees.

Woods, J.—The demurrer of the appellees was sustained to the complaint, and judgment rendered accordingly. The defendant, the City of Terre Haute, alone was served with process from the court below, and the only question urged upon our attention is, whether the complaint shows a good cause of action against said city. The purpose of the action was to charge the city and other defendants for labor done in the construction of the railroad of the Cincinnati and Terre Haute Railway Company, of which the defendants were the stockholders at the time the labor was done. We find it unnecessary to set out a copy of the complaint, or to give special consideration to its allegations, as no defect is claimed which could be supplied by an amendment. The whole contention of the counsel on either side is upon the question, whether a municipal corporation, organized under the general laws of the State for the incorporation and government of cities, is bound by the same liability which, under the 38th section of the "Act to provide for the incorporation of railroad companies," approved May 11th, 1852, attaches to an ordinary stockholder in such company. The city made her alleged subscription of stock in September, 1871. The section of the law referred to is as follows:

"Sec. 38. The stockholders shall be individually liable to laborers, their executors, administrators and assigns, for all labor done in the construction of said road, that shall remain unpaid after the assets of the corporation shall have been exhausted." 1 R. S. 1876, p. 712.

By an act approved May 4th, 1869, it was enacted, "That any city, incorporated under the general law of this State, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to the stock of any railroad, hydraulic company, or water power, running into or through such city, or near the corporate limits of said city, . . . subject, however, to the limitations, direction and restriction named in the provisos to the sixtieth section of the act entitled 'An act to repeal all general laws now in force for the incorporation of cities, prescribing their powers and rights,' " etc., approved March 14th, 1867. The provisos referred to contain nothing pertinent to our present inquiry. 1 R. S. 1876, p. 299.

These provisions of the law seem to be so plain and direct to the point as to leave little room for debate upon the question presented for decision. The counsel for the appellee has favored us with an

elaborate brief, wherein he argues that the city defendant is not subject to the individual liability which is imposed on the individual stockholder. The argument turns entirely upon the following propositions, advanced by the counsel, namely :

"1st. That the liability of municipal corporations must appear in their charter, that being the instrument from which their power to become stockholders is derived ; if no liability is authorized to be incurred or created by the charter, then none exists.

"2d. That the section of the railroad act above set out is unconstitutional, because the subject matter thereof is not expressed in the title of the act, nor does it relate to a subject properly connected therewith."

We do not question the accuracy of the first proposition, but its application leads us to a conclusion directly the opposite of that for which the appellees contend. By the act of May 4th, 1869, the Legislature made an express grant to the defendant of the power to become a stockholder in a railroad company. So far as in their nature they could be exercised or enjoyed, it is clear that the rights and privileges of an ordinary stockholder belonged to the city when it became a stockholder as alleged ; and it seems to be equally clear that, in conferring the power to acquire the rights and benefits, the Legislature must have intended to impose the attendant burdens. Indeed, the right conferred has no legal existence or definition apart from the duties and obligations expressly connected therewith.

It is true, as suggested, that the city could not become the president, director, or other officer or agent of the railroad company, and, it may be, could not be counted as one of the "number of persons, not less than fifteen, being subscribers to the stock of any contemplated railroad," which the 1st section of the general railroad law requires, in order to form a railroad corporation. But, it is plain that these things are not essential to, and inseparable from the fact of, membership in the corporation. They are essentials to the corporate existence, but not to membership therein. The shareholder may or may not be the president or director ; but he cannot have a shareholder's common rights, and not be subject to the common liabilities, unless there is in the law some warrant for the exception. The act of December 17th, 1872, "to require railroad companies to issue stock paid for by taxes," etc., in certain specified cases, contains an express proviso, "that the stock so issued under the provisions of this act, being involuntary in its character, no personal liability shall attach to the original holder thereof for any debt contracted by the railroad company." A similar proviso should, and doubtless would, have been embodied in the act of May 4th, 1869, if the Legislature had intended a like exemption from liability on the part of such cities as should avail themselves of the powers conferred by that act. In this re-

spect there is some analogy between this case and the case of Gray Governor, *v. The State*, ex rel. Coghlen, 72 Ind. 567, wherein the court, in considering the rate of interest which the creditor of the State was entitled to receive on his bond (one of the internal improvement bonds of 1836), says: "We see no reason why the State, as a debtor, should be placed in any other or different situation, as to its obligation to pay interest, than that occupied by any private debtor or other public corporation. 1 Dan. Neg. Instr., sec. 436; *Murray v. Charleston*, 96 U. S. 432. In the case last above cited the court said: 'The truth is, States and cities, when they borrow money and contract to pay it with interest, are not acting as sovereignties; they come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.'"

It has been held that if a sovereign State, which cannot be sued without its own consent, has voluntarily rendered itself liable to a private action, and if it has become a stockholder in a private corporation, it has subjected itself to the same liabilities which attach to any private stockholder. *Curran v. the State*, 15 How. 304; *Robinson v. The Bank of Darien*, 18 Ga. 65; *Thompson, Liability of Stockholders*, sec. 20; *Morse Banks, etc.*, pp. 516-518; *National Bank v. Case*, 99 U. S. 628. In the case last cited, the Germania Bank held, as collateral security for money loaned, shares of stock in the Crescent City National Bank, of New Orleans, and, the latter bank having become insolvent, was held subject to the liability of a stockholder, the court, among other things, saying: "There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking act that prohibits it. But, if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action." And much less can the appellee escape the responsibility of having taken stock which the law expressly authorized it to take.

In support of his proposition that the 38th section of the act for the incorporation of railroad companies is unconstitutional, after quoting section 19, article 4, of the constitution, the counsel for the appellee cites and comments on the following cases: *The State v. Young*, 47 Ind. 150; *The State v. Wilson*, 7 Ind. 516; *Foley v. The State*, 9 Ind. 363; *Gillespie v. The State*, 9 Ind. 380; *Mewherter v. Price*, 11 Ind. 199; *The State v. Bowers*, 14 Ind. 195; *Igoe v. The State*, 14 Ind. 239; *Spaugh v. Huffer*, 14 Ind. 305; *Grubbs v. The State*, 24 Ind. 295; *The Town of Fishkill v. Fishkill, etc.*, P. R. Co., 22 Barb. 634; *The People v. Allen*, 42 N. Y. 404; *The People v. Hills*, 35 N. Y. 449; *The People v. O'Brien*, 38 N. Y. 193; *The City of San Antonio v. Gould*, 34 Tex. 49;

Prothro v. Orr, 12 Ga. 36; Cutlip v. Sheriff of Calhoun County, 3 W. Va. 583; The People v. Commissioners, etc., 53 Barb. 70; Gaskin v. Anderson, 7 Abb. Pr. (N. S.) 1; Gaskin v. Meek, 8 Abb. Pr. (N. S.) 312; Settle v. Van Evrea, 49 N. Y. 280.

Without taking the time to make a statement of the scope and bearing of these cases, as we should hardly be justified in extending our opinion to the length necessary for that purpose, we content ourselves with saying that they do not require us to accept, nor would they justify us in adopting, the conclusion for which counsel contends. The constitutional provision is, that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." 1 R. S. 1876, p. 30. The title of the act in question is, "An act to provide for the incorporation of railroad companies." The incorporation of railroad companies is the "one subject" of this act, and we entertain no doubt that it was "matter properly connected therewith" to provide for the individual liability of the stockholders in such companies as should be organized under the law. It is only the "one subject" which must be expressed in the title.

We hold, therefore, that the complaint is good as against the objections which have been brought to our attention, and consequently that the circuit court erred in sustaining the demurrer thereto.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint.

Petition for a rehearing overruled.

W. J. CHASE

v.

E. T., VA. AND GA. R. R. Co.

(5 *Lee Reports Tenn.* September Term, 1880.)

A stock company, not having express power granted to declare a forfeiture of stock for non-payment, may sue for the amount of subscription to stock, and on failure to collect full amount subscribed, may collect residue by sale of stock subscribed for.

Appeal from the Chancery Court at Jonesboro. H. C. Smith, Chancellor.

I. C. Reeves for complainant.

C. R. Vance for defendant.

FREEMAN, J., delivered the opinion of the court.

This bill charges, substantially, that, in 1852, complainant subscribed for eight shares of stock in defendant's company, amounting to \$200; that he failed to pay his calls for the stock, and the company took a judgment against him for the amount due, on which he has since paid \$110, leaving balance unpaid. He says he is financially unable to pay this balance, and that at a meeting of the board of directors some years since a resolution was passed declaring his stock forfeited, and he is now denied the privileges of a stockholder. He prays, on these facts, that the company be enjoined from collecting its judgment, and he be paid back his money already paid. He admits he has never called on the company for a certificate of stock to the amount of his payment. The company answers and admits all the facts, concedes the declaration of forfeiture was unauthorized and void, and says that on payment of balance due he shall be restored to his position as stockholder.

Respondent, however, by way of cross-bill, on the facts stated, asks an account of the balance due, and a sale of complainant's stock in satisfaction of the amount. This cross-bill was dismissed on demurrer by the chancellor, and relief granted on the original bill, giving a decree for the amount paid with interest, on the ground that the declaration of forfeiture relieved complainant from all liability on the subscription, and entitled him to restitution of the money paid.

We take it to be clear, as admitted, that the directory had no power to disfranchise the subscriber for stock, or deprive him of his rights, unless in accord with their charter. *Waits Act and Def.*, vol. 2, p. 331. And it has been held this act must be judicially conducted and party heard before action, unless some special provision for other proceeding is authorized by the charter; or, possibly, this might be regulated by by-laws adopted, not violating any provision of the charter. *Ibid.*

We take it to be now settled, that the capital stock subscribed or paid in, and other property of a corporation, is a trust fund for the payment of the debts of the corporation, so that the creditors have a lien on the same. *Thompson on Liability of Stockholders*, sec. 10, and authorities cited. The other shareholders also have rights in reference to such stock. This being so, it follows that the directory could not release it, nor modify the contract, except in accord with the provisions of the charter. An unauthorized act by them cannot, by estoppel, discharge the obligations of the stockholder, so that he stands after the action of the board in this case precisely as before.

He is, then, entitled to be restored to the position occupied before the action of the board, and declared a holder of stock to the extent of his subscription, subject, as a matter of course, to legal authorized action of the corporation. To this extent on the facts he is entitled to a decree, no further.

The company is as clearly entitled to sell his stock thus held to pay the judgment it has, on the facts stated, and the chancellor erred in sustaining the demurrer to the cross-bill of respondent.

The decree will be reversed in accord with this opinion, and the case remanded to be proceeded in under the cross-bill. Half of the costs of the court below will be paid by the company, balance by complainant and all the costs of this court.

ALICE GREENLEE ET AL.

v.

E. T., VA. AND GA. R. R. Co.

(5 *Lea Reports* [Tenn.], 418. *Sept. Term*, 1880.)

A suit brought by a widow under the act of 1871, ch. 78, for injuries causing the death of her husband, may be dismissed by her over the objection of the children of the deceased.

Appeal in error from the Circuit Court of Jefferson county. J. G. Rose, J.

O. C. King for Greenlee.

Geo. Brown for Railroad.

TURNER, J., delivered the opinion of the court.

Wm. A. Greenlee was killed on the road of the defendant by its engine and train. Mary Greenlee, widow, instituted suit for damages.

On compromise, the company paid her \$1,500, and also paid the costs, in consideration of which she agreed to dismiss her suit.

The motion to dismiss was resisted by some of the children of deceased, who asked to be permitted to prosecute, insisting the suit was instituted for the joint benefit of the widow and themselves. The court refused the application, and dismissed the suit upon the terms of the compromise, to which the children excepted and appealed to this court.

The question is, can the widow, under the statutes authorizing the suit, dismiss it against or without the consent of the children?

The act of 1871, ch. 78, sec. 1, provides: "That sec. 2291 of the Code of Tennessee be so amended as to provide that the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children or his personal representative for the benefit of his widow or next of kin, free from the claims of his creditors."

Sec. 2: "That section 2292 be so amended as to allow the widow, or if there be no widow, the children, to prosecute suit, and

that this remedy is provided in addition to that now allowed by law in the class of cases provided for by said section and sec. 2291 of the Code, which this act is intended to amend."

It is true, as argued, that the suit is for the benefit of the widow and children. It is also true, the widow alone has the right to sue in the first instance. The children have the right only when there is no widow. The widow may sue or not, at her option. We have holden that if she fail to sue for the period of twelve months, the suit is barred even as to minors. Having, then, the right to sue, to be exercised at her own election, it follows, as a necessary incident to that right, that she may control the suit by compromise, abandonment, prosecution or dismissal. The amendments do not destroy or take away the interests of the children in the recovery, or, in this instance, the compromise.

The judgment must be affirmed.

RICHARD BROWN

v.

WILLIAM J. HITCHCOCK.

(36 Ohio State Reports, 667. January Term, 1881.)

The individual or personal liability of stockholders, under section 79 of the corporation act of May 1, 1852 (1 S. & C. 310); also under section 8 of April 10, 1861, regulating street railroad companies (S. & S. 136), attaches in favor of creditors at the time the debt was contracted or the liability incurred by the corporation.

After such liability attaches to a stockholder, it is not discharged by the subsequent assignment or transfer of his stock; but the successive assignees or holders, by accepting the stock, and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him as stockholder while he held the stock.

In a suit by creditors to enforce such liability against the stockholders of an insolvent corporation, the existing stockholders are severally chargeable with the payment of such liability.

If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency.

ERROR to the Court of Common Pleas of Mahoning County.
Reserved in the District Court.

CHARLES H. KILGOUR v. JOHN J. HOOKER.

ERROR to the Superior Court of Cincinnati.

JONATHAN H. WINTERS ET AL. v. GABRIEL HARMAN, ET AL.

ERROR to the District Court of Montgomery County.

The case of Brown v. Hitchcock is an action brought by a creditor of a manufacturing corporation, against the corporation and its

stockholders, to subject the statutory liabilities of the stockholders to the payment of a judgment previously recovered by Brown against the corporation.

The amended petition, having alleged the recovery of the judgment against the corporation and the insolvency of the corporation, further says that at the time of the recovery of the judgment against the corporation and of the beginning of the action in which the amended petition was filed, Hitchcock and all the other persons named as defendants were stockholders and the only stockholders of the manufacturing company; that Hitchcock purchased his stock after the indebtedness on which judgment was rendered was incurred by the corporation, but before said judgment was rendered; and that he purchased said stock well knowing of such indebtedness and subject thereto, and with the understanding and agreement that said stock was chargeable with indebtedness, and that said indebtedness was for property and machinery held and owned by said company at the time said Hitchcock purchased said stock and became a member of said corporation. It also states that no other indebtedness than the said judgment of plaintiff exists against the corporation.

The defendant, Hitchcock, demurred on the ground: first, that facts sufficient to constitute a cause of action against him were not stated, and second, that there was a defect of parties defendant. This demurrer was sustained, because it was not alleged that the defendants were stockholders at the time the debt was contracted for which the action was brought, and judgment was rendered in favor of defendant, Hitchcock. On error in the district court, the cause was reserved for the decision of this court.

The Kilgour case was an action by Charles H. Kilgour against John J. Hooker and others, the object of which was to enforce the statutory liability of the stockholders of the Pendleton Street R. R. Co. for the payment of the debts of said company. The petition alleged that the plaintiff was both a creditor of said company and a stockholder therein. That all the defendants, except one (The Franklin Bank) were also stockholders in said company. That the plaintiff had obtained a judgment against the company at the February term, 1868, of the superior court, and that at the same term the Franklin Bank had also recovered a judgment against said company. That the company's property had all been sold under proceedings in another suit, leaving nothing for the payment of the claims of plaintiff and the Franklin Bank and other claims not in judgment, and that the company was wholly insolvent. That each of said stockholders was liable to the plaintiff and the other creditors of said company pro rata with the other stockholders to such amounts as were unpaid on their stock, and in a sum of money equal to the amount of his stock—or to such proportion thereof as might be required to pay all the debts of said company. The peti-

tion prayed that an account be taken of the debts of the company, and the stockholders' liability be ascertained and that assessments on them be made to pay the debts.

Judgment was rendered against each of the stockholders, among whom was Hooker, for the amount of the assessment on his stock, necessary to pay the debts.

Hooker filed a petition in error in the general term, where the judgment against him was reversed on the sole ground that the petition did not state that he was a stockholder when the debts of the company were contracted.

The case of *Winters v. Harman* was an action by Harman and others against Winters and others to enforce the statutory liabilities of the stockholders of the Oakwood St. R. R. Co., a corporation organized under the laws of Ohio, and all who had been stockholders of said corporation.

The petition alleges the recovery of a judgment against the corporation, the insolvency of the corporation, and the transfer of certain shares of stock, etc., and prays for an account and assessment, etc. Among the defendants were the plaintiffs in error, Jonathan H. Winters, John G. Ziesler, and Benjamin Kuhns, all of whom made sales and transfers of their stock long prior to the suit and the insolvency of the company, but while there were some debts, and which, with the debts incurred subsequently, existed at the time of said suit.

Winters, in his amended answer, in substance says, that the company, at the time of his transfer, was indebted in but a small amount, while the assets were many times the amount of the liabilities; that Isaac Haas, to whom he made sale and transfer, was then responsible—in fact, reputed wealthy; that the transfer was for a full consideration, and not made with a view to escape liability, the stock being passed in the ordinary course of business; and further, that the road was long thereafter sold for \$10,000, an amount many times greater than the debts that existed against the company at the time of his said sale of stock.

The facts in the Ziesler and Kuhns amended answers are much the same,—the transfers being at a still later period. Ziesler and Kuhns each state that the transfers were made in the ordinary course of business; that E. A. Parrott, the transferee, was then and is now responsible, and able to pay the full amount of the statutory liability on the stock so by him purchased.

The court sustained demurrers to these defences. The court held that the said plaintiffs in error were bound to contribute their portion for the payment of the debts that existed at the time of the transfers, and that the transferees were only bound to contribute for the payment of the debts incurred subsequent to the transfers. The decision of the common pleas was affirmed by the district court.

It is here sought to obtain a reversal of these judgments.

H. H. Moses, for plaintiff in error, in the case of *Brown v. Hitchcock*, claimed that by virtue of the statute 1 S. & C. 310, passed for the purpose of carrying out and applying the provisions of article 13, section 3 of the constitution of Ohio, the creditors of a company include all persons who have claims against the company, regardless of the time the debts were contracted. That all stockholders shall be deemed and held liable (to the extent mentioned and limited by the statute) for the purpose of securing all creditors. *Wright v. McCormick*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Ohio St. 113; *Middletown Bank v. Magill*, 5 Conn. 63; *Gilman v. Bank of Cincinnati*, 8 Ohio, 62; *Curtis v. Harlow*, 12 Met. (Mass.) 3; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Story v. Furnham*, 25 N. Y. 214.

The cases from 32 N. H. 388; 2 Hill, 265; 35 Cal. 155, cited by counsel for defendant, arose under statutes entirely different from ours. They made the stockholders liable as partners, or as though there was no act of incorporation.

Sidney Strong, for defendant in error, *Hitchcock* :

For the defendant in error, I insist that no sufficient cause of action against him is stated in the amended petition, which alleges that he did not become a stockholder until after the corporation incurred the indebtedness on which the action is brought, and, therefore, that the common pleas properly sustained his demurrer to the amended petition. If *Hitchcock* is liable on the facts stated in the amended petition, his liability must exist either first, because it is law, when stock in a manufacturing corporation organized under the statute in question is sold and transferred after a debt is incurred by the company, and before judgment is rendered against the corporation on the debt, that both the seller and the purchaser of the stock are liable, under the expressed limitation of the statute, for the payment of the debt; or, second, because the individual liability in such a case can be enforced under the statute against the assignee, and not against the assignor of the stock.

1. As to whether, in such case, both the buyer and seller of stock are individually liable under the statute, see *Larrabee v. Baldwin*, 35 Cal. 155; *Moss v. Oakley*, 2 Hill, 265; *Chesley v. Pierce*, 32 N. H. 388; *Middletown Bank v. Magill*, 5 Conn. 38; *Hooker v. Kilgour*, 2 C. S. C. R. 350.

II. When stock has been sold and transferred after a debt is incurred by the corporation and before judgment is recovered thereon against the corporation, is the stockholder who owns the stock at the date of the judgment and when suit is brought to enforce the individual liability, liable and alone individually liable for such indebtedness, so far as regards the stock which he owns? If the assignee in such a case is alone individually liable on the assigned stock it must be either, first, because the liability does not attach

when the debt is made by the corporation, or second, because the liability, though attaching when the debt is incurred, follows the assigned stock, and the assignor upon making the assignment ceases to be liable and the assignee by the same act becomes liable. Of these two propositions in their order :

1. For the defendant in error I submit that under the statute the individual liability of the stockholder to any creditor of the corporation arises when the debt is incurred, and then attaches to the stockholders who then own the stock. *Wright v. McCormick*, 17 Ohio St. 86 ; *Umsted v. Buskirk*, 17 Ohio St. 113.

2. If the individual liability provided by the constitution and the law attaches when the obligation of the corporation arises, I maintain that this liability is not assignable and does not pass from the seller to the buyer of the stock. If the creditor, by the transaction in which the obligation of the corporation arises, obtains for his security the individual liability of those who then own the stock, his property in the individual liability of those stockholders is as invisible as his property in the primary obligation of the company. He has a vested interest both in the primary obligation of the corporation and in the conditional liability of those who then own the stock. The acts of others cannot deprive him of either or any of his vested rights. It would be, I submit with deference, an act of violence to so construe this statute, enacted for the creditor's benefit, as to permit him thus to be robbed. The obvious intent of the statute is to afford a real security to creditors. Under it the credit may fairly be said to be given to the corporation and to the individual liability of the present stockholders. The statute warrants the creditor in making his contract, to do so in full reliance on the continuing liability of those who then own the stock. His so-called security becomes a delusion and a snare if those who are bound for his security can of their own will release themselves from the obligation and transfer it to others. Counsel may say that a transfer of stock made for the purpose of avoiding the liability would be held fraudulent. It would always be difficult to show the intent of the transfer, and, besides, the creditor may suffer from assignments made in good faith as well as from those which are fraudulent. The vice inherent in the doctrine that the liability follows the assigned stock is that without his consent the creditor can thus be deprived of that in exchange for which he parted with his property, and be compelled to accept in its place such other security as may graciously be accorded him.

Healey & Brannan, with whom were Matthews, Ramsey & Matthews, for plaintiff in error in the case of *Kilgour v. Hooker* :

I. The statutory liability of a stockholder to the amount of 100 per cent. over and above the amount of his stock, is not dependent on his being a stockholder when the debt was contracted, but is a

burden which attaches to the stock into whosoever hands it passes, except in the case of fraudulent transfers to irresponsible persons for the purpose of avoiding liability. *McCullough v. Moss*, 5 Denio, 567; *Story v. Furman*, 25 N. Y. 214; 1 Comst. 47; *Stanley v. Stanley*, 21 Me. 191; *Curtis v. Harlow*, 12 Metc. 3; *Child v. Coffin*, 17 Mass. 64; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Bond v. Appleton*, 8 Mass. 472; *Allen v. Montgomery*, 11 Ala. 437; *Webster v. Upton*, 1 Otto, 65; *Dauchy v. Brown*, 24 Vt. 197; *Middletown Bank v. Magill*, 5 Conn. 28.

The question as to what stockholders are to be held upon the liability imposed by statute has given rise to conflicting decisions in the different states, but we think that where it has been held that only those persons are liable who were stockholders at the time the debt was contracted, it will be found that the decision was based on the peculiar phraseology of the statute of the particular state, and also that these cases are, in general, like those in New York, cases where the statute makes the stockholders individually liable for the debt of the corporation, so that the creditor can sue the stockholder directly, just as if it were a private debt.

Collins & Herron, for defendant in error, *Hooker* :

The statute being enacted for the protection of creditors, should be given that construction which will best protect them. When they give the credit, they are entitled to know who are the stockholders, and to consider how much security there is in the individual liability of the then stockholders. If, after the credit is given, the parties then stockholders can evade their liability by getting their stock off to persons of doubtful responsibility, the protection to the stockholders would decrease, just as the prospect of insolvency to the corporation increased. *Savage, C. J., Allen v. Sewell*, 2 Wend. 327; *Pierce Am. R. R.*, ch. 20, p. 510; *Moss v. Oakley*, 2 Hill, 265; *Adderly v. Storm*, 6 Hill, 226; *Tracy v. Yates*, 18 Barb. 152; *Judson v. Rossie Galena Co.*, 9 Paige, 598; *Corning v. McCullough*, 1 Comst. 117; *Stanley v. Stanley*, 13 Shepley, 191; *Southmayd v. Camp*, 3 Conn. 52; *Hosmer C. J., Middletown Bk. v. Magill*, 5 Conn. 44, 53; *Deming v. Bull*, 10 Conn. 407; *Marcy v. Clark*, 17 Mass. 330; *Chesley v. Pierce*, 32 N. H. 388. *Story v. Furman*, 25 N. Y. 214, does not overrule the previous line of decisions in that state, but turns upon the peculiar phraseology of the charter of the Woolgrowers' Manufacturing Company.

The chief authority relied upon by the other side is the warm opinion of Judge Chapman, in a divided court, in seeking to relieve a hard case. 5 Conn. 28.

In a case in Massachusetts where the statute permitted it, the court, looking to the protection of the creditors, held not only those who were members when the debts were contracted, but also those

who were members when the debt was sought to be enforced. *Deming v. Bull*, 10 Conn. 409; *Curtis v. Harlow*, 12 Metc. 3; *Bond v. Appleton*, 8 Mass. 472.

Gunckel & Rowe, for plaintiffs in error, in the case of *Winters v. Harman*, claimed that by the assignment of error the following questions were raised.

1st. Are transferrers of stock bound (to the extent of an amount equal to the stock sold) for the obligations of a company made while they were stockholders—their said stock having been sold in the ordinary course of business, and while the company was largely solvent, although, subsequent to the sale, the company became insolvent, with the debts made prior to the transfer remaining unpaid?

2d. Do the liabilities follow the stock, if sales are made in good faith? In other words, do transferees take the stock subject to the existing liabilities?

3d. Do not creditors in dealing with corporated companies, under our laws, consent to transfers in good faith, being made with the understanding that in case of insolvency of the company, they will look alone to the corporation assets and the holders of stock at the time of the failure?

The questions here raised are of the greatest importance. It is the accepted law among all classes that a transfer of stock, in good faith, rids the seller of all liability. If, however, the law itself be as defendants in error claim, capital will no longer purchase, or loan upon, or deal in, stocks. Corporation enterprises would soon come to an end if there were no safety in transfers, and owners of stocks should be compelled to remain in companies out of self-protection until every dollar of debt is cancelled.

Debt is incident to all corporations, and sales of stock are made with reference to that fact; yet, under the erroneous holding herein of the courts below, each transfer of stock creates a responsibility that hangs over the transferrer, although he is powerless to protect himself, and although the creditor has the right and power to enforce his claim while collectible against the corporation, yet does not.

The following cases support our view: *Story v. Furman*, 25 N. Y. 214; *Cushing v. Shepherd*, 4 Barb. 113; *Dibble v. Rogers*, 13 Wend. 536-541; *Empire City Bank Case*, 8 Abb. Pr. 192; *Eames v. Wheeler*, 19 Pick. 442; *Force v. Dahlonga*, 22 Ga. 86.

We claim then that assignors in good faith are not liable, and that the words "each stockholder" in section 3, article 43 of the constitution, and "all stockholders" in the statute 1 S. & C. 310, evidently mean the stockholders at the time the liability is sought to be enforced. *Curtis v. Harlow*, 12 Met. 3; 25 N. Y. 221; *Ex parte Sutton*, 14 Jur. 566, 966; *Ex parte Croxton*, 11 Law & Eq.

227; Cape's case, 19 Law & Eq. 1; 5 Conn. 28; 8 Mass. 472; 24 Vt. 197.

Alfred A. Thomas, for defendant in error, Harman, claimed that under our constitutional provision, and the statute authorizing this corporation, those stockholders are liable to a creditor on the statutory liability who were stockholders when the debt was contracted. Const. art. 13, § 3; 1 S. & C. 134; 1 Sup. Ct. R. 236; 2 Id. 350; 2 Wend. 343; 2 Hill, 68; 9 Paige, 598; 1 N. Y. 5, 56; 10 N. Y. 459; 14 Wis. 701; 17 Mass. 333; 46 N. H. 374; and cases cited by counsel in the other cases.

WHITE, J. The statutory liability of stockholders involved in the case of *Brown v. Hitchcock*, arises under section 78 of the act of May 1, 1852, to provide for the creation and regulation of incorporated companies (S. & C. 310); the liability in the other two cases arises under section 8 of the act of April 10, 1861, to provide for and regulate street railroad companies (S. & S. 136).

The first question arising for determination is, when does such liability attach in favor of creditors?

It was held, in *Wright v. McCormack* (17 Ohio St. 86), that the liability "is not a primary resource or fund for the payment of the debts of the corporation; but is collateral and conditional to the principal obligation which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process."

The question whether the individual or personal liability of stockholders attached in favor of creditors at the time the debt was contracted, or the liability incurred by the corporation, did not arise in that case. Nor would it be a material inquiry in any case where there was no change in the stockholders from the time of the incurring of the liability by the corporation, to the enforcement of the personal liability of the stockholders.

The conditional character of the liability spoken of in the case referred to has reference to the condition to which its enforcement by creditors is subject, and is not intended to indicate that its taking effect as an obligation in favor of creditors is conditional or contingent. The condition to which the liability is subject is, that it is not available to creditors, as a security, until they are unable to obtain payment of their demands from the corporation.

The question now is, when does this individual or personal liability of stockholders to creditors, as a security, in addition to the liability of the corporation, take effect? not, when may it be resorted to by creditors to obtain payment of their demands?

The constitution, in providing for the creation of corporations by the general assembly, prescribes, as a condition to their creation,

that the creditors of such corporations, in addition to the liability of the corporation, shall be secured by the individual liability of the stockholders. The constitutional provision is as follows:—"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock." Art. 18, § 3.

The corporation act of May 1, 1852, above referred to, was the first act passed on the subject of corporations after the adoption of the constitution. Section 78, as amended April 17, 1854, was intended to carry the constitutional provision into operation. The section is as follows: "All stockholders of any railroad, turnpike or plank-road, magnetic telegraph or bridge company, or any joint-stock company organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of such company, and the trustees or directors of every society or association incorporated under section 66 of this act, shall be deemed and held individually liable for all debts contracted by them, for their respective societies or associations." S. & C. 310; 4 Curwen, 2582.

Under these provisions it seems to us that the security furnished by the stockholder's liability, in addition to that of the corporation, attaches in favor of creditors at the time the debt is contracted or the liability incurred by the corporation.

The corporation itself is a mere legal entity, existing only in legal contemplation, and is created for the convenience and benefit of the stockholders. All its dealings are for and on their account. It can contract no debts except under the authority, express or implied, of the stockholders, and through their corporate agents. Our constitution and laws therefore make it an essential condition to persons thus availing themselves of the instrumentality of a corporation for the transaction of business that the security of their personal liability shall attach to and attend all corporate liabilities.

In speaking of this liability of stockholders, in *Corning v. McCullough* (1 Comst. 47, 55), the court say: "It is a liability which every stockholder must be understood to assume and take upon himself and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust as well to the personal liability of the stockholders, as to the responsibility of the corporation for the fulfillment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the

company is consummated." And again, on p. 54 it is said: "It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties."

The same principle is laid down by the Supreme Court of the United States. *Hawthorne v. Calef*, 2 Wall. 10. In this last case it was held that a statute impairing the right of existing creditors to resort to such liability of stockholders for payment, was void, as impairing the obligation of a contract. See, also, *Ochiltree v. Railroad Co.*, 21 Wall. 249, 252.

In *Norris v. Wrenschall* (34 Md. 496) and in *Hager v. Cleveland* (36 Md. 476), the stockholders' liability to creditors is held to be in the nature of a contract. The court says: "It is a debt under the statute, due from the stockholder to the creditor, springing out of, and co-existent with, the contract between the corporation and the creditor." And such being its nature, it is also said: "It is clear that no act by the stockholder, without the consent of the creditor, can exonerate him from the liability thus incurred."

Whether the liability is joint and several, or several only, does not affect the question as to the time at which the obligation attaches to the stockholder in favor of the creditor. In *Corning v. McCullough*, *supra*, the liability was joint and several; but before the stockholder was liable to suit, there must have been an execution against the corporation returned unsatisfied.

In the Maryland cases the liability was limited and several only.

The language of the constitution is that "in all cases each stockholder shall be liable, over and above the stock by him or her owned . . . to a further sum, at least equal in amount to such stock;" and of the statute that, "All stockholders . . . shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock," etc.

To hold that this language embraces only those who may turn out to be stockholders at the winding up or settlement of the affairs of the corporation is, it seems to us, unwarranted. These provisions are intended to guard against improvidence in contracting debts on behalf of corporations, and to give security to creditors. These objects are best accomplished by attaching the liabilities to those under whose control the corporation is operating, and who are known to those dealing with it as the persons interested. And certainly, when admissible, such a construction ought to be adopted as will promote these ends.

This view is further fortified by section 74 of the act of 1852, which provides for reducing the amount of the capital stock of corporations, and the nominal value of all the shares thereof; but pro-

vides "that the rights of creditors shall not be affected, or in anywise impaired, by the reduction of the capital stock of any such corporation."

The act of April 3, 1868, providing for the reduction of capital stock, contains in section 5 a similar provision, applicable to corporations not created under the act of 1852. S. & S. 242.

The next question is, whether, after the liability attaches to a stockholder, it is discharged by the subsequent assignment or transfer of his stock. We think it is not. The liability, it is true, attaches to him in respect to his stock, but after it has attached in favor of creditors it becomes as obligatory upon him personally as an express agreement. His successive assignees or holders, by accepting the stock and all the rights and benefits arising therefrom, impliedly undertake to indemnify or discharge him from the liability which attached to him as a stockholder while he held the stock.

Each successive owner stands in his shoes as respects the stock and the liabilities growing out of it. This arises out of the nature of the property and the relations of the parties to it and to creditors, in connection with the equitable principle that he who derives all the advantages ought to bear the burdens. For applications of this principle see *Sutliff v. Atwood*, 15 Ohio St. 186, 194; *Johnson v. Underwood*, 52 N. Y. 203, 211; *Hodkinson v. Kelly*, L. R. Eq. C. 6, 496, 503; *Cape's Ex'r's*, Case, 2 De Gex, M. & G. 562; In the Matter of the Mexican & S. A. Co., *Gieseewood & Smith's Case*, 4 De Gex & J. 544, 555.

The expression, "all stockholders," must be regarded, in the absence of any legislative indication to the contrary, as including not only those who were such at the time the indebtedness was incurred, but all those who successively stand in their shoes in respect to the same stock.

The extent of the liability is not increased, whether the stockholder first liable retains the stock or transfers it; and the extent of the security of the creditors, both as to the stock and the personal liability, is the same as it would have been if no transfers had been made.

In a suit to enforce the liability against the stockholders of the insolvent corporation, the existing stockholders are severally chargeable with such liability. If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock successively, up to the time the liability attached, may be charged with the deficiency. Such suit, in this state, must be in equity, and prosecuted for the benefit of all the creditors. *Umsted v. Buskirk*, 17 Ohio St. 113. And where equity has jurisdiction, the liabilities of the parties are so marshalled as to first charge those who, as between themselves, are ultimately liable.

The constitution of the state of New York of 1846 (article 8)

declares that all dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law; and that stockholders in every banking association, issuing bank notes after January 1, 1850, shall be individually responsible to the amount of their respective shares for all its debts and liabilities contracted after that date. State Constitutions, part 2, 1863.

April 5, 1849, the legislature of that state passed an act to enforce this responsibility of stockholders in banking corporations. 4 Statutes at Large, 154. Section 3 of the act declares this responsibility to attach primarily to the person who is a stockholder at the time the debt or liability is contracted by the company; but also provides that it may be shifted entirely from him to another, declaring that he shall be exonerated in respect to any stock which shall have been transferred on the books of the company (previous to any default in the payment of the debt or liability) to a resident of the state, of full age, in good faith, and without any intent to evade such responsibility; and the assignee is made responsible to the extent of such stock in the same manner as if he had been the owner at the time of the contracting of the debt, with the same power to transfer this liability to another by like assignment.

Without a transfer, as therein provided, it is evident the liability of the stockholder who was such at the time of the contracting of the debt, would continue as to the creditor.

The constitutionality of this act was upheld in the case of the Empire Bank, 6 Abb. Pr. 385; s. c., 18 N. Y. 199.

The provision in our constitution as to individual liability, is modelled after that in the New York constitution, though somewhat varied in terms; and the principle of liability, as applied to banking corporations in New York, is declared by our constitution to apply to all corporations.

The constitution of California, adopted in 1849, in article 4 provides:

"Section 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities." State Constitutions, pt. 1, 199.

It was held in *French v. Techemaker*, 24 Cal. 539, that section 36 was not self-executing, but required legislation to carry it into operation. In the subsequent case of *Larrabee v. Baldwin*, 35 Cal. 155, it was held that the legislature had power to limit the stockholders' liability to his proportion of all the debts and liabilities of the company contracted or incurred during the time he was a stockholder.

In England, under the joint stock companies act of 1862, a per-

son who has ceased to be a member for a year or upwards, prior to the commencement of winding up proceedings, is not liable to contribute to the payment of debts, nor is a past member liable to contribute with respect to a debt or liability contracted by the company after he ceased to be a member; and no past member can be required to contribute unless the existing members are unable to pay. Wordsworth on Joint Stock Companies, 59, 60.

In the cases before us, the general assembly have not undertaken to prescribe the extent of the liability nor to regulate its enforcement, further than to adopt the minimum liability allowable by the constitution, leaving it to be enforced by the judiciary upon such legal and equitable principles as should be found appropriate to the subject.

It is said, in *Umsted v. Buskirk*, supra, that "the right arising out of this liability is intended for the common and equal benefit of all the creditors;" but no question there arose as to the liability of successive stockholders of the same stock, as between themselves or to creditors, and that language must be understood as limited to the case then before the court.

The language of section 8, in the act regulating street railroad companies, is as follows: "The stockholders of every company organized under this act, shall be liable for the dues of such company over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum equal in amount to such stock."

This section does not substantially differ from that already considered in the corporation act of 1852, and the liability of the stockholders to the creditors is the same in both.

In the case of *Brown*, the judgment is reversed, the demurrer to amended petition overruled, and cause remanded.

In the case of *Kilgour*, the judgment in general term is reversed and that of the special term is affirmed.

In the case of *Winters et al.*, the judgments are reversed and the cause remanded for marshalling of the liabilities of the stockholders according to the principles above stated.

MOLLVAINÉ, J.—I regret that, upon a question of so much importance, a difference of opinion should exist among the members of the court; but being unable to agree with the majority, I deem it a duty to state very briefly the grounds of my dissent.

Admitting that section 3, article 13, of the constitution does not execute itself, it is nevertheless true that the statutes passed in pursuance thereof, and involved in the cases before us, do not pretend to vary the minimum liability of stockholders as fixed by the section of the constitution above named, and which reads as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be provided in law; but in all cases, each stockholder shall be liable, over and

above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

A majority of the court hold that the individual liability of the stockholder, provided for in the last clause quoted, attaches in favor of the creditor and against stockholders owning stock at the time credit is given. If this be so, the judgment in the case is clearly right; for I admit, that a stockholder, upon whom the constitution fixes the liability, cannot, by a transfer of his stock, discharge his liability to a creditor in whose favor it attached, although, as between successive owners of the same stock, the primary liability, by virtue of an implied contract obligation, may rest upon the owner who may be such at the winding up of the corporation. But, on the other hand, if the liability first attaches to the stockholders, who may be such at the time suit is brought to enforce it, I apprehend that no one will contend that prior owners of the stock can, under such circumstances, where good faith has been observed, be held liable to creditors.

I also admit, that the security for dues from corporations thus provided, was intended to induce and does induce credit to be given to them; and that in giving credit, an accurate knowledge of the solvency of the security offered is an important element. But, after all this is admitted, the question, whether knowledge of the solvency of the stockholders at the time credit is given to a corporation can be regarded as an element inducing the credit, depends entirely upon the solution of the main question: Does the constitution (or the statute) fix the liability in question upon such stockholders?

In determining this main question, it must be assumed that the framers of the constitution had in mind the transferable nature of corporate stock, and everything that is implied or understood therefrom; and it must also be assumed, that persons giving credit to corporations upon the faith of the individual liability of stockholders as provided by the constitution, must have in mind the same facts; so that the argument that a knowledge of the solvency of stockholders, at the time credit is given, induces such credit, although persuasive, is not conclusive as to the true interpretation of this clause of the constitution. Indeed, the persuasive power of the argument is almost, if not altogether, lost, when we admit the observance of good faith toward the creditor of the corporation in the making of transfers of stock. If such faith is kept, and it must be, I see no reason for apprehending that stockholders at the winding up of corporations will not be as responsible for such individual liability as the stockholders who were such at the time credit was given, whether the period between the dates be short or long. Between the date of contracting the debt and the enforcing of the individual liability, many years may intervene, and many successions in the ownership of stocks; yet, it seems to me, that no reason

exists for believing that, as a general rule, the stockholders at the latter date will be less able to respond than those of the date of contracting the debt.

In determining the true meaning of this provision in the constitution, it must be observed, that each stockholder, who is made liable at all, is made liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock. The language is, "but, in all cases, each stockholder shall be liable," etc. There is no doubt about the meaning of these words. The meaning is, that whenever this liability attaches in favor of a creditor and against a stockholder, such stockholder is bound to the last farthing of the liability fixed, before such creditor shall lose a farthing of his claim. A less liability on the part of the stockholder will not give such creditor the security intended. By the decision of the court, as I understand it, the effect given to this provision is the same as if it read, "but, in all cases, the successive owners of each share of stock, in the aggregate, shall be liable," etc. So that, if the owner at the winding up discharges the liability named, all previous owners of the same stock are exonerated, although creditors, who gave credit while they were owners of the stock, receive payment of their claims only in part. While I admit that the amount of security raised for the creditors in the aggregate by the payment by all the stockholders at the time of winding up, of the full amount of the individual liability fixed by the constitution, is all that was intended to be secured, it does not make "each stockholder" upon whom the liability attached, according to the decision, liable for the amount named in the provision. The effect of the decision is to attach the liability to the stock and not to the stockholder.

There is no disagreement between the members of the court in this; that the aggregate security for the dues of a corporation thus provided, is the aggregate stock of the corporation and all amounts unpaid thereon, together with a further sum equal to the total amount of the stock, and no more; nor is there any disagreement between us as to the rule that the security thus provided, when realized, must be distributed pro rata among all the creditors of the corporation, without regard to the time when credit was given, and without respect to the persons who owned stock when the debt was contracted. The correctness of these views being conceded, it appears to me, beyond doubt, that the terms of the provision, "in all cases, each stockholder shall be liable, over and above the stock by him or her owned and any amount unpaid thereon, to a further sum at least equal in amount to such stock," point directly and plainly to stockholders who may be such at the time the liability may be enforced, and that each stockholder who is liable at all, is liable unconditionally for the full amount named.

It has heretofore been decided by this court, upon unquestioned

reasoning, that the individual liability of stockholders, under our constitution, is not a primary resource or fund for the payment of the debts of a corporation; that is to say, it cannot be resorted to by a creditor in the first instance and for his own benefit. That it is a security for the exclusive benefit of creditors, over which the corporation has no control. That it can be resorted to by creditors only in case of the insolvency of the corporation, as where payment cannot be enforced by ordinary process. And that no creditor can acquire any priority over such fund, or institute a suit for the enforcement of such liability in his own behalf. 17 Ohio St. 87, 113.

In addition to the points thus decided, it can safely be asserted that this liability can be enforced but once. I am not now discussing the power of the legislature over this subject, but simply affirming that the liability fixed by the constitution can be enforced only once. And this being so, it seems to me that after its enforcement the corporation can no longer have a rightful existence, for the reason that it is essential to the rightful existence of a corporation that the individual liability of the stockholders shall inure as a security for all debts contracted; hence, when such security is exhausted, the rightful existence of the corporation must cease.

Now, in view of these principles, the true meaning of the constitution is manifest. "Each stockholder shall be liable." When liable? The answer is patent,—at the winding up of the corporation. Liable for what? The dues of the corporation. To what extent? "In a sum at least equal to the amount of the stock by him or her owned." By whom owned? By the stockholder so made liable. Owned by him or her when? At the time the liability is sought to be enforced. But this sum is not the only liability of "each stockholder." The stock by him or her owned is also made liable. Not the stock which he or she may have transferred, but the stock which he or she may then own. And further, for any amount unpaid on such stock. It matters not who may have subscribed the stock, or who may have owned it at the time the debt was contracted, or whether calls had been made or not; it is enough that the stockholder is the owner at the time the liability is enforced. Such ownership at that time makes him liable to creditors for any amount unpaid thereon.

Not only is the plain and obvious meaning of the words of the constitution against the construction of the majority of the court, but, I think, every consideration of trade and public policy. The sale and transfer of corporate stocks are impeded. Responsibility for unfaithfulness in the future management of corporations remains with the vendor after his ownership, interest and power of control are transferred. The principle of repose after unreasonable delay in the enforcement of claims, is also disregarded. The

statute of limitations can afford no relief to such a surety. The creditor and the corporation may continue the liability for indefinite periods. Even the ordinary privilege of a surety to compel his principal to pay the assumed debt after maturity cannot be asserted by a person liable under this provision of the constitution.

The construction which I have adopted I believe is not only consistent with the terms of the constitution, and the intention of the framers, but is the only one which can work out complete justice between all parties. As between successive owners of stock, its justice is plain. The value of stocks depends in a large measure upon the relations between the assets and liabilities of the corporation. The assets are at all times held in trust for creditors and stockholders, and the management of the trust devolves upon the stockholders and officers for the time being. The vendee of stock, therefore, impliedly engages with his vendor that the assets shall be faithfully applied. And having purchased at a price determined by the excess of assets over liabilities, as between vendor and vendee, the latter, alone, should be burdened with the payment of debts.

And it does no violence to the faith in the securities upon which credit is given to the corporation. The transferable nature of corporate stock is universally understood. A creditor has no right to expect that the stock will not be sold and bought. All that he has a right to expect is that the stock will not be fraudulently transferred with a view to diminish his security in the individual liability of stockholders. And while he is entitled to the increased security which may be afforded by the succession of solvent to insolvent stockholders, he should submit to the diminished security of insolvent successors, where no bad faith has been practised.

JOHNSON, J.—I fully concur in the foregoing opinion of Judge McIlvaine. The difficult nature of the question involved, the importance of the case, and the effect of the opinion of the majority on the character and value of property in the state, represented by corporate shares, induce me to state briefly one or two of the reasons for my dissent.

Under the liberal policy of past state legislation, authorizing corporations for almost every kind of business, having its inception and a large development under the constitution of 1802, and a still larger one under that of 1851, a vast amount of the individual property of the state is represented by shares in such corporations.

Any legislation or any decision which materially affects the character and value of this species of property, heretofore so liberally fostered and encouraged, is a matter of great public concern.

The constitutional provision under consideration was intended to remedy an existing evil, and to provide an additional security to

creditors. Prior to its adoption, there was no individual responsibility (except by legislative enactment in a few instances), of those who had the management of the corporate business. Hence the provision that: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon to a further sum, at least equal in amount of such stock."

One of the peculiar and valuable features of corporate shares, arises out of their transferability without the vexatious restraints imposed upon the sale and transfer of partnership or other common property.

Prior to the adoption of this provision, it was well settled, that stockholders could dispose of their interest in the corporation by a sale of their shares as fully as they could any other species of property, and by a transfer cease to be stockholders. The transferee became a stockholder and the owner of the stock, charged with all duties and liabilities as such. He was invested with all the powers and rights, and was subject to all the responsibilities as if he had been an original subscriber.

This alienable quality of corporate shares added greatly to their value. Of course, a sale to hinder, delay, or defraud creditors did not release the assignor, any more than a like sale of other property; but a bona fide sale was just as valid as a like sale of other property.

The scope and intention of the constitutional provision and the statute were simply to further secure creditors when the assets of the corporation were insufficient to pay all debts, by imposing a liability on the owners of the shares of stock, at least equal to its par value. The liability at common law was to lose the investment. This loss fell on the owner of the stock, not on the assignor. In addition to this loss, the object of the statute, as well as this constitutional provision, was to impose upon the same person an individual liability.

It is a misnomer to call one a "stockholder" and the "owner of stocks," and so liable to assessment, who has long since ceased to be such by a bona fide sale and transfer. The transferees are such stockholders and owners in fact and in law, and are entitled to represent this stock in all proceedings of the corporation.

The statute containing this liability clause clearly shows, in other clauses on the same subject, that this is its true meaning.

The corporators, their associates, successors and assigns, are clothed with all corporate powers, and as a legal consequence, are charged with all the duties and liabilities imposed on owners of stock. The obligations and duties of stockholders go hand in hand with and are inseparable from their rights and privileges.

Section 7 of this act gives a statutory remedy for the collection of unpaid stock, and makes the transferee or assignee liable.

In case of a sale, the assignee by that section is the stockholder and owner, made liable in case the stock does not sell for sufficient to pay the amount due. This unpaid amount on stock is the same debt mentioned in the constitution and in the liability clause of this statute as unpaid stock, and the person who is liable under the one as an owner, is liable under the other. Under section 7, it is the assignee in case of a sale that is liable as the owner, and for equally strong reasons, the same meaning should be given to the liability clause, both being used in reference to the same subject matters.

Again, sound principles of justice would dictate, that those who are in law the stockholders for the purpose of receiving dividends and enjoying the rights incidental to ownership, should be liable to pay the losses, when by their mismanagement, fraud or from other causes, the creditors go unpaid.

This statutory liability is collateral and conditional. It can only be resorted to in equity, when the assets of the corporation prove insufficient. *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Ohio St. 113.

Being collateral and conditional, no primary liability attaches, or can attach, when the debt is created. No liability attaches, nor does any right of action accrue to creditors, until the condition happens that fixes the liability. To hold that this liability attaches to those who are stockholders when the debt is contracted, and that in case of a transfer the creditor must first exhaust the assignee when the contingency arises, presents an anomaly. It compels the creditor to resort to a stranger to his contract before he can pursue the man he trusted.

Again, if the assignor is liable in case of default of his assignee, he is guarantor of the solvency of the latter, when the time arrives to resort to the stockholders. He becomes liable for an indefinite period for the conduct of stockholders over whom he has no control.

Much stress is laid upon the assumed, not actual, fact that every creditor looks to the stockholders when he trusts the corporation. Admit that this is so, yet he also is presumed to know, that each stockholder has the right at any time to retire, and it may be properly said, he trusts the corporation, subject to this right of transfer.

If such a contingent liability is to hang over a stockholder for an indefinite period after he has parted with his stock and lost his power to control, no prudent man will care to invest in such shares.

If, on the other hand, we apply the same rules that govern the alienation of other property, and that governed the sale and transfer of stock prior to this provision of the organic law, we preserve the harmony of the law relating to sales of all other property.

For these and other reasons that I have not time to write out, I dissent from the opinion of the majority.

GRISWOLD, Appellant,

v.

SELIGMAN.

(72 Missouri Reports, 110. October Term, 1880.)

One may render himself liable as stockholder in a corporation as well by his conduct in respect to the stock of the corporation, as by formal subscription and acceptance of stock.

Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but was to be held by them "in trust" as declared by a resolution of the board of directors, or "in escrow," as it was expressed in an entry on the stock book of the corporation; and while so holding the stock, defendants voted it at one election and thus elected the directors and other officers, and thereby obtained complete control of the corporation; *Held*, that they were estopped to deny that they were stockholders, and were liable as such, both to the corporation and its creditors; and this, so far as the creditors were concerned, whether they became such before defendants had so treated the stock or not.

NORRIS, J., dissenting, denied that there was any liability.

HENRY, J., agreed that defendants were liable to creditors, but denied any liability to the corporation.

Where stock is held under a written contract, as security for advances, it is not competent to show that there was a verbal understanding that the bailees were to have the privilege of voting the stock.

Section 9, p. 301, Wag. Stat., in relation to railroad companies, provides that "no person holding stock in any such company * * * as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company.

NORRIS, J., dissenting.

Where a statute of this State is derived from another state, a decision of the supreme court of that state construing it, rendered after its adoption here, does not carry with it that authoritative force that it would have had if it had been rendered before the adoption.

Appeal from Jasper Court of Common Pleas.—Hon. E. O. Brown, Judge.

REVERSED.

The facts are stated in the opinions.

W. H. Phelps for appellant.

One who holds and uses stock, and so gets the benefit of it, is

liable to the creditors of the corporation, even though it be issued as collateral security, or in trust to secure a debt due the corporation. *Wheelock v. Kost*, 77 Ill. 296; *Pullman v. Upton*, 96 U. S. 329; *National Bank v. Case*, 99 U. S. 628. Respondents having voted the stock and enjoyed the privileges of stockholders, they should be held to a stockholder's liability as to creditors, although the stock was originally given to them as collateral security. *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 149; *In re Empire City Bank*, 18 N. Y. 199; *Hale v. Walker*, 31 Iowa, 344.

John P. Ellis also for the appellant.

1. In order that a creditor of a corporation may hold one liable as a stockholder, who is not a subscriber, it is not essential that the creditor shall have become such by reason of the conduct of the other party or the facts relied upon as constituting an estoppel. *Sanger v. Upton*, 91 U. S. 63; *National Bank v. Case*, 99 U. S. 631.

2. Delivery of the stock to the defendants vested the title in them. *Moss v. Riddle*, 5 Cranch, 351; *Flay v. Maim*, 2 Sumner, 510; *Henshaw v. Dutton*, 59 Mo. 139. In order to be in escrow the delivery should have been to a stranger.

H. H. Harding and Broadhead, Slayback & Haessler for respondent.

Our statutes make a clear distinction between mere stockholders and stock-owners. The latter only are qualified to be directors; (*Wag. Stat.*, 299, § 6,) while any stockholder may vote at elections, though he be not the absolute owner of the stock. It is stock-owners only who can be made liable for the debts of the corporation. *Wag. Stat.*, 291, § 13; *R. S.*, § 736.

Neither according to common law, nor under our statute, can a man become legally a stockholder, so as to enable him to participate in the management of the affairs of the corporation, merely by becoming the holder of a certificate of stock, even though the certificate may be transferred to him in writing by one who is a member of the corporation; it requires the consent of the corporation before an individual can become a member of it, and this generally must be done either by subscription to the stock of the corporation, or by transfer to him on the books of the company and with its consent by a person who is the owner of stock. Both modes of becoming a member of the body corporate require the concurrence of the corporation. In this case there is no transfer of ownership, either by an individual who had acquired the stock or by the corporation. Defendants took the stock to hold as trustees for the benefit of such persons as might advance money to the company. If because they accepted the certificate, they became owners of 60,000 shares of the stock, instead of getting security, they were contracting an immense liability. The fact that the certificate was

absolute and unconditional on its face, does not estop them from showing that they did not hold it as owners; (*McMahon v. Macy*, 51 N. Y. 155; *Tonico & Pet. R. R. Co. v. Stein*, 21 Ill. 96; *Lathrop v. Kneeland*, 46 Barb. 432; *Jones v. Portsmouth R. R. Co.*, 32 N. H. 544;) especially since the evidence was in writing.

It is claimed that inasmuch as the stock certificate was absolute on its face, persons dealing with the corporation had the right to infer that the defendants held the stock absolutely. But it is not pretended that any one was deceived or misled by this fact; besides, the stock register or transfer book is the place to look for the purpose of finding out who are stockholders. The certificates of stock issued are no part of the records of the corporation; they belong among the private papers of the individuals holding them for any purpose, and are not open to public inspection, but the stock register is the place for persons dealing with the corporation to see who are members, (*Thompson on Stockholders*, § 177,) and when we come to look at the stock register in this case it shows that this stock was held in escrow by the defendants, not in their own right. But there is no rule, statutory or otherwise, requiring notice to be given to the world as to who is the owner of stock in a corporation, nor as to how the stock is held, and in the absence of any such rule, it must be a matter depending upon the contract between the corporation and the stockholder, as to who is the owner of stock.

It is claimed that the exemption from liability provided in the first clause of section 9, page 301, *Wagner's Statutes*, is limited to cases where there is some one to respond to liability under the second clause of the section. But the first clause of the section referred to is broad enough to cover the case of the trustee, and the statute clearly means that no person is liable unless he holds the stock in his own right. Of course, if he holds it for any one, the person for whom he holds it, and who is the real owner, is and ought to be liable. *Matthews v. Albert*, 24 Md. 527; *Guest v. Worcester R. R. Co.*, 38 L. J. (C. P.) 23; *Thompson on Stockholders*, § 224; *McMahon v. Macy*, 51 N. Y. 155.

SHERWOOD. C. J.—This appeal questions the correctness of the ruling which denied plaintiff's motion for execution against defendants. The point thus presented for determination is, whether the defendants are answerable as stockholders. The relation of stockholder may be created not only by the usual formalities of subscription and the acceptance of stock, but other acts are, in contemplation of law, the legal equivalent of those just mentioned. That is to say, conduct on the part of the person sought to be charged is, of itself, sufficient to accomplish all that could be accomplished by the rigid observance of those formalities usually attendant on becoming a stockholder.

The law declaratory of this position is well settled in America

and by the earlier authorities in England. *Thomp. on Stock*, § 150.

Thus, in action of debt for calls, one who, though not a subscriber had paid a call as such, was held estopped to deny his membership, and a like ruling was made in a similar instance, where the defendant had attended the half yearly meeting of the proprietors. *Railway Co. v. Graham*, 2 Eng. Ry. Cas. 870; *Railway Co. v. Gunstone*, 2 Eng. Ry. Cas. 870. So, also, where the issue raised, as in the cases cited, was, whether the defendant was the proprietor of shares and consequently liable for calls, and it appeared that he had represented himself to the company in that capacity, claiming to be registered as such in consequence of scrip certificates purchased by him and sent in to the company, for which he had received receipts and a notice from the company that the scrip would be exchanged for sealed certificates on demand, he was held estopped to deny his liability for calls, though the provisions of the act necessary to make him proprietor had not been complied with by the registry of his name or the entry or any memorial of transfer, Lord Denman, C. J., remarking: "A party cannot, by his own conduct, change his liability at pleasure. . . . All the machinery which the legislature renders necessary to constitute a member is in this instance dispensed with by the conduct of the parties." *Railway Co. v. Daniel*, 2 Eng. Ry. Cas. 728. And that case was held not distinguishable from one decided at the same time, where, in addition to the facts first noted, the defendant had paid calls on some shares and begged time as to others. *Railway Co. v. DeMedina*, 2 Eng. Ry. Cas. 735. In such cases it is held that a "valid and binding contract" is formed between the company and the person sought to be charged as contributory if there has been a course of dealing with the company wherein they have permitted the alleged transferee to become a shareholder *de facto*. *Straffon's Exrs. Case*, 1 DeG., Mac. & G. 576, and cases cited. The beneficial use of stock will also render the person so using it liable as a shareholder. This is well illustrated in *Maguire's case*, 3 DeG. & Smale, 31, where the son, unaware that two shares had been transferred him by his father, signed certificates obtained from the company's office as proprietor, and on several occasions by this means secured a free passage in the vessels of the company. was held properly placed on the list as contributory, the vice-chancellor saying: "This gentleman is shown so plainly and distinctly to have represented himself and to have acted as proprietor, that in my opinion it is established that he is a proprietor, and if a proprietor, a partner and a contributory."

In this country instances are abundant where parties sued as shareholders at the instance of the corporation or of creditors, have been held either estopped by their conduct from denying their liability, or that their conduct was cogent evidence of such liability. Thus,

where a party who, though released from the obligation of his subscription, had subsequently voted at the annual meeting for directors, was himself elected as a director, acted in that capacity and as a stockholder, and paid money to the company, although no call was made therefor, it was held in an action for calls that these acts very strongly warranted the presumption that he had resumed his original obligation as a stockholder. *Railroad Co. v. Stewart*, 41 Pa. St. 54. Upon analogous grounds, one who had been voted a member of a New England parish, had in that capacity attended and voted at parish meetings and acted as trustee of the parish funds, was held a member, and that his body could be taken in execution for a parish debt, though he had not, in compliance with statutory requisition, filed any certificate of membership. *Chase v. Bank*, 19 Pick. 584. And the enunciation of a similar doctrine is made by the supreme court of the United States when declaring that: "An implied promise is proved by circumstantial evidence; by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself in a position which requires the performance of duties." *Webster v. Upton*, 91 U. S. 65. The same court say, in *Upton v. Tribilcock*, 91 U. S. 45: "The acceptance and holding of shares in a corporation make the holder liable to the responsibility of a shareholder. . . . A promise to take shares of stock imports a promise to pay for them. The same effect results from an acceptance and holding of a certificate." And where a corporation had accepted parties as legal stockholders, entered their names on the stock books as such, and given them all the privileges of stockholders, it was held that they must be taken to be stockholders for the purpose of liabilities as well as sharing in the profits to be divided among the members. *Bank v. Goodman, etc.*, 9 Cush. 576.

In *Sanger v. Upton*, 91 U. S. 56, an action by an assignee of a bankrupt corporation, where stock certificates were issued in blank to the defendant, and she paid upon the stock twenty per cent. of its par value at the time, and a like amount subsequently, and received a dividend from the company, and the stock stood in her name upon the books of the company, she was held liable, Mr. Justice Swayne remarking: "The only question was, whether she owned the stock. No one else claimed it. The certificates were issued and delivered to her. They belonged to her. They were the muniment of her title. She could have filled the blanks with her name whenever she thought proper. . . . She was estopped from denying her ownership. She could not assert her title if there was a profit and deny it if there was a loss." It is very noteworthy in that case there was no evidence tending to show that defendant "ever subscribed for said certificates of stock or for any stock of said company, or that her name appeared on any list

of stockholders circulated by said company." There is no public register of stockholders provided for in Illinois, where that case arose. 3 Dillon, 505. Nor was there any evidence to show that any creditor of the company became such subsequently to defendant's purchase of stock, or in consequence thereof, or in short, altered his condition by giving credit to the company on the faith of defendant's being a stockholder. So that case, as well as that of *Carver v. Upton*, 91 U. S. 64, the record of which I have examined, and which was decided upon facts substantially similar, manifestly proceed upon these grounds, and can, in reason, proceed upon no other, that the time at which a person becomes a stockholder is not considered material, and that whenever a party, in consequence of his course of conduct, by his acts and representations, is to be deemed a stockholder as toward the company—is estopped by that conduct from denying his liability as to the company—he is likewise and for the self-same reasons precluded from denying his liability as to creditors. For whenever a person "has been treated as a shareholder by the company, and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder." 1 Lindley on Partnership, 129. "If a person is a member of a company as between himself and the company, then, whether he is so by reason of his having become a member by complying with all requisite formalities, or by reason of the doctrine of estoppel, he ought, upon principle, to be deemed a member to all intents and purposes." *Ib.* 129. And it would be anomalous, indeed, to hold that such a relationship by estoppel could exist as between a person and a corporation and yet have no existence as to creditors. *Ib.* 130.

I have been able to find but one case, *Vice v. Anson*, 1 Man. & Ry. 113, where a creditor suing an individual not a stockholder de jure, for a corporation debt, has been denied recovery unless able to establish that the debt was contracted on the personal credit of the particular person sought to be charged. Mr. Thompson in his recent work treated this case as an exceptional one, and says it has frequently been "distinguished" by the English judges in subsequent cases. *Thomp. on Stock.*, § 175. This statement finds confirmation elsewhere. *Owen v. Van Ulster*, 10 C. B. 318; 1 Lindley on Part., pp. 95 and 149, and cases cited.

In Davidson's case, 3 Deg. & Smale, 21, as a mere matter of accommodation he was induced to sign for 100 shares, on the express understanding, a memorandum of which was entered in the company's books, that he was to receive nothing and incur no liability in respect of the shares. Under this agreement he disposed of thirty shares, the purchase money of which was paid to the directors, and afterwards transferred the remaining shares to the manager. He never received or paid anything in respect of the shares, nor did it appear that any one was prejudiced by his con-

duct, and yet he was held a contributory, Vice-Chancellor Bruce saying: "It has not been proved or alleged that strangers did not, and I think it reasonable to assume that strangers did become shareholders after the transaction." We have in this State no public registry of stockholders, as in England and in some of our sister states. The public has no access to the book in which is registered the transfer of shares of stock, or to any other book containing the names of the stockholders, those books being accessible to stockholders alone. 1 Wag. Stat., 299, § 6, subdiv. 8. Consequently it must be very obvious that instances of holding one's self out to the world as a stockholder, and so becoming chargeable can rarely occur here. This view finds support in the reflection that under the terms of our statute no one is liable as a stockholder unless occupying that relation at the time of the issuance of execution. *McClaren v. Franciscus*, 43 Mo. 452. So that, if by some fortuitous circumstance a creditor should ascertain that a particular person was a stockholder, and give credit to the corporation on the faith of such person being then a stockholder, it must be upon the faith also that such person would continue to be a stockholder down to the issuance of execution, a supposition which cannot, with any great show of reason, be indulged.

In the present instance the defendants were appointed the financial agents of the company; they were large holders of its bonds; their names were entered on its books as stockholders; they held, and still retain, an absolute and unconditional certificate for 60,000 shares of the stock, which was a majority of the authorized stock; they voted that stock at one annual election, thereby electing the directors and other officers of the company, thereby obtaining entire management and control of its affairs. If after the course of conduct pursued by them, defendants can, in the face of the fact of voting as stockholders, now successfully assert their non-liability as such, it must be confessed that the doctrine of stockholdership by reason of implied contract, and by reason of estoppel as announced in the foregoing authorities, is shorn of whatever vigor it heretofore has been thought to possess. To deny in such circumstances defendants' liability would be to declare the unpalatable doctrine, a doctrine peculiarly unpalatable in American courts, that a person may play fast and loose; may enjoy all the benefits and emoluments of stockholdership without shouldering a tithe of its usually inseparable burdens; may accomplish by an indirection what could not be accomplished directly; nay, in a word, be a stockholder to vote, but not a stockholder to pay. The bare statement of such a doctrine condemns it, and its perniciously unjust results justify the condemnation.

But it is claimed that this case is exempted from the operation of the principles enunciated by the cases cited, and the defendants from the liability which otherwise had been incurred, by reason,

first, of the contract entered into between defendants and the corporation, and by reason, second, of this statutory provision: "Section 9. No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act and held the stock in his own name." Wag. Stat., p. 301.

Relative to the contract in question, it is clear that parol evidence of contemporaneous "agreements and understandings" is as plainly inadmissible here as it would be in any other instance whatsoever. *Thomp. on Stock*, § 121, and cases cited. Hence parol evidence that "it was understood that defendants were to have the privilege of voting the stock" is altogether incompetent to effect the purpose for which offered, *i.e.*, to add to or vary the written contract of the parties. For this reason the act of voting the stock must be regarded as one not done in the exercise of any contract right, but as a totally independent act—an act certainly not referable in any manner to the contract relied on; since that provided for the company to deposit with defendants a majority of the capital stock authorized to be issued, said stock to remain in the control of defendants for one year at least, and the resolution of the directors merely provided that certificates for a majority of the capital stock be issued to defendants to hold in trust for the period of twelve months. The attempt must, therefore, prove futile to derive any authority to vote the stock from the stipulations of the contract.

Nor is the opinion entertained that the contract brings defendants within the purview of the above quoted section of the statute; for the very terms of the section suppose that stock has been issued in usual course, and then in consequence of either the death of the original stockholder, or the coverture or minority of the person beneficially interested, there is no one in esse who should be made "personally subject" to liability as a stockholder, and for this reason it is that the "estates and funds" in the hands of the fiduciary named, are made liable "in like manner and to the same extent," as if death had not occurred in the one case, or coverture or minority existed in the other.

The only other exception the section makes is where the stock is held as "collateral security," but there, while the pledgee is expressly exempted from liability as a stockholder, the pledgor is expressly held liable as occupying that relation. The section, in short, is

one of exceptions; one declaratory of non-liability in certain specified instances, leaving the question of liability in all other cases to be determined as if no such section existed; and this, upon the familiar grounds that the expression of one thing is the exclusion of another, and that statutory exceptions are to be strictly construed. *Richardson v. Harrison*, 36 Mo. 96, and cases cited. The evident purpose and policy, the fundamental idea of the section being discussed, as well as others in *pari materia*, both constitutional and statutory, require that the creditors of the corporation should be abundantly secured against loss; and this end was sought to be accomplished by providing that some person or estate should always be ready to respond to the demands of creditors. It seems too plain for discussion that any other construction would defeat the legislative purpose. If these views be correct, if the statute only exempts those classes of persons which it expressly designates, the defendants falling in neither of such classes, not being executors or administrators of some deceased stockholder, nor guardians or trustees of some one laboring under the previously mentioned disabilities, it can only follow that the case stands here for determination, as before stated, as if the section under consideration did not exist. Here there was no pledgor, and, consequently, could be no pledgee within the meaning of the statute, since it is little less than absurd to say that a corporation could be its own stockholder. *American Ry. Frog Co. v. Haren*, 101 Mass. 398; *Dayton & Cin. R. R. Co. v. Hatch*, 1 Disney, 84; *Ex Parte Holmes*, 5 Cow. 426; *Brewster v. Hartley*, 37 Cal. 15; *State ex rel. Page v. Smith*, 48 Vt. 266.

Section 5152, United States Revised Statutes, is virtually identical with the section just discussed. Britton, president of a National bank, bought stock with the bank's funds and held it registered on the books as held by "Britton, trustee for the bank." Judge Dillon, in *Johnson v. Laflin* 5 Dill. 65; s. c., 6 Cent. Law Jour. 124, had under consideration section 5152, *supra*, in reference to the facts just stated, and held that "Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no cestui que trust who is liable," and the learned judge further held on that occasion, that "in the eye of the law the transfer to Britton as trustee, is a transfer to him individually," and that "if it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any cestui que trust capable of taking and holding the shares." A similar ruling was made on the same section in *Wheelock v. Kost*, 77 Ill. 296, a proceeding by creditors, where a party loaned money to a National bank, for the benefit of that corporation and received as collateral security the bank's certificates of stock issued in pledge. Afterward he received semi-annual dividends thereon, and it was held that he

been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock."

I think it clear that before an execution can issue under the above section against a stockholder, it must be shown that the stockholder proceeded against is the owner of stock on which there is an unpaid balance. Ownership of stock may be acquired either by subscription of a person on the stock books and the issue of stock to him, as the charter may provide, or by transfer on the books of the company, with its consent, by one person, the owner of stock, to another.

The evidence shows that the Seligmans, who are sought to be charged in this proceeding as the owners of 60,000 shares of unpaid-up stock, never subscribed for said stock on the books of the company, and that said shares were never transferred to them by another person, the owner thereof, on the books of the company and with its consent. It does show that the stock in question was issued to the Seligmans, not in virtue of any subscription made by them or any transfer made to them, but in virtue of a contract between the corporation and the Seligmans in 1872, under which defendants agreed as financial agents of the company to make certain advances of money to the company to enable it to complete its road, and in consideration of the advances made and to be made the company agreed to execute and deposit with the Seligmans its entire issue of first-mortgaged bonds, and to deposit with them a majority of the capital stock authorized to be issued, the stock to remain in the control of the Seligmans for one year. It appears that in pursuance of this contract, on the 22d day of May, 1872, the board of directors of the company passed a resolution as follows: "That in making negotiations for money with J. & W. Seligman & Co., certificates of a majority of stock be issued to J. & W. Seligman & Co. to hold in trust for the period of twelve months, and that such certificates be signed by the president and secretary with the corporate seal of the company affixed." On the books of the company also appears the following entry: "J. & W. Seligman; residence New York: shares 60,000 (held in escrow); amount of dollars, \$6,000,000. May 20th, 1872." This evidence, while it fails to establish that Seligmans were the owners of such stock, does, on the contrary, establish the fact that they were not the owners but simply the custodians of it as trustees. This the contract, the resolution of the board of directors and the entry on the stock books, all indicate and nothing more, and by no process of reasoning known to me, can an inference even be drawn from these facts that it was the purpose of either the Seligmans or the company to fasten upon the Seligmans a liability to the company for \$6,000,000, when it is apparent that the object of the transac-

tion between the parties was to secure through the Seligmans advancements of money to complete the road, for which they were to be made secure by the deposit with them of first-mortgage bonds and a majority of the capital stock.

That the legislature did not intend by the section quoted above, and which gives origin to the proceeding, to make a mere holder of stock who was not the owner liable, is manifested by section 771, Revised Statutes 1879, which declares that "no person holding stock in any such company, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act, and held the same stock in his own name." This section clearly exempts from liability all persons holding stock in a fiduciary capacity. The exemption is absolute, and is not dependent on the fact that there is no *cestui que trust* to answer the liability under the last clause of the section. A section of the statute of Maryland, of which section 771, *supra*, of our statutes is a literal copy, has been construed in the case of *Matthews v. Albert*, 24 Md. 527, and the construction therein given sustains the view above expressed. In that case the corporation itself issued the stock as collateral security, and the holder of the stock was sought to be made liable, and it was held that by virtue of said section he was exempt from liability. The stock in that case had been deposited with one Tiernan, who had loaned the company \$2,000, as collateral security for the loan, and it was contended that the statute did not apply to a case when the company itself pledged the stock, but the court held otherwise, and observed: "That in our opinion his (Tiernan's) claim was for money loaned and the stock transferred to him was held as collateral security for his loan, and so holding it he is not personally subject to any liability as stockholder, but is protected by the provisions of the act of 1852, chapter 338."

It appears from the evidence that the Seligmans voted the stock held by them at one or more elections for directors, and it is claimed that having so acted they are estopped both as to the company and its creditors from disputing the fact that they were the owners of the stock. I think that the doctrine of estoppel does not apply in this case. To create an estoppel in pais something more is required than the mere assertion (if voting the stock was an assertion by Seligmans) that they were the owners of the stock. To establish an estoppel in pais, it must usually appear, first, that one party has made an admission or assertion inconsistent with the

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evidence proposed to be given, or the claim offered to be set up; second, that the other party has acted upon such admission or assertion; and third, that such other party would be injured by allowing such admission or assertion to be disproved. *Taylor v. Zepp*, 14 Mo. 482; *Newman v. Hook*, 37 Mo. 207. The doctrine of estoppel cannot be invoked by the company, because the evidence shows that the Seligmans, in voting this stock, did so with the consent of the company and with full knowledge on its part that they were not in fact stockholders or owners of the stock, and it does not show that in consequence of said act of Seligmans the company took any action which altered its condition. Nor can the doctrine be invoked in this suit in favor of the creditor prosecuting it, because it does not appear that the debt of the company upon which his judgment was obtained was contracted on the faith of said act or even subsequent to the voting of the stock by Seligmans. For these reasons I do not concur in the opinion rendered.

The question raised and discussed at length in the principal case is by no means a new one. A large number of decisions have been rendered in analogous and a few in almost identical cases. All these rest upon a plain and obvious principle of law, which principle it is the aim of the present note to elucidate.

In the first place, however, it may not be inappropriate to consider the form of action in the principal case. It was a bill in equity to enforce the payment of unpaid subscriptions to the capital stock of a corporation. That a bill may be entertained for such a purpose is clear from authority—independent of statutory provisions. *Adler v. Milwaukee Pat. Brick Mfg Co.*, 13 Wisc. 57; *Spear v. Grant*, 16 Mass. 9; *Vose v. Grant*, 15 Mass. 505; *Ward v. Griswoldville Mfg Co.*, 16 Conn. 598; *Mann v. Pentz*, 3 Comst. 415; *Nathan v. Whitlock*, 9 Paige, 153; *Henry v. V. & A. R. R. Co.*, 17 Ohio, 187; *Hightower v. Thornton, et al.*, 8 Ga. 487; *Briggs v. Penniman*, 3 Cow. 287; *Glee v. Bloom*, 20 Johns. 669; *Allen et al. v. Montgomery R. R. Co.*, 11 Ala., N. S. 487; *Wood v. Dummer*, 8 Mason, 808; *Ogilvie v. Ins. Co.*, 23 How. 380; *Marsh v. Burroughs*, 1 Woods, 463; *Wilbur v. Stockholders*, 35 Leg. Int. 23; *Bank of Va. v. Adams*, 1 Pars. 584; *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Milwaukee Construction Co.*, 38 Wisc. 258; *Dalton, etc., R. R. Co. v. McDaniel*, 56 Ga. 191.

The proper persons to fill the bill are creditors of the corporation who have reduced their claims to judgment, and who have issued an execution which has been returned "nulla bona." This latter proceeding is indispensable, otherwise equity will not take cognizance of the proceeding, since non constat but that the corporation has assets and that therefore there is an adequate remedy at law.

In Pennsylvania it has been held, contrary to general principles, that the passage of an act providing an adequate statutory remedy in such cases ousts the equitable jurisdiction. *Suydam v. N. W. Ins. Co.*, 1 Smith, 894. But the act in question has since been repealed.

An assignee or official receiver of an insolvent corporation has no authority to file a bill of this sort, nor, indeed, to bring any action for the recovery of that portion of unpaid subscriptions to the capital stock of the corporation which has not been called for by a vote of the directors. *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 id. 871; *Pierce v. Milwaukee Const. Co.*, 38 Wisc. 153; *Coleman v. White*, 14 id. 700; *Carpenter v.*

Marine Bank, id. 705; *Umstead v. Buskirk*, 17 Ohio St. 118; *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Tielman*, 22 U. S. 156.

Turning now from the form of action to the question raised in the principal case, it may be laid down as a principle that any person who so acts as to lead others to believe that he is the true owner of stock in a corporation will be held estopped from subsequently denying his liability in that capacity. Two sets of persons are apt to be deceived by his conduct: First, creditors of the corporation who advance their money partly on the faith of his connection with it, and who look to his subscription to the capital stock as a trust fund for their benefit; and second, subsequent subscribers to the stock of the corporation who embark in the enterprise partly on the faith of his having done so. For the protection of both these classes of persons, any one holding himself out to be a stockholder in a corporation will be held liable as such, no matter what his true position may be.

This principle was expressed with great force by Comstock, C. J., in the case of the *Reciprocity Bank*, 22 N. Y. 17, as follows:

"If a person makes an actual purchase of shares, whether from the bank or an individual holder, and voluntarily allows himself in this manner to be represented to the world as a stockholder, he must take the responsibilities of that situation. He comes within the terms and the policy of the act. His title may be imperfect. Equities may exist between him and other parties; the shares may be in dispute; they may be claimed by some one else in hostility to his own right. The statute has no regard to such questions. The person who has caused or allowed his title to be registered on the books cannot deny the truth of that representation and disavow the ownership when it ceases to be a benefit and comes to be a burden."

And see *McHose v. Wheeler*, 45 Pa. St. 82; *Hawley v. Upton*, 102 U. S. 314; *Phila., etc., Ry. Co. v. Cowell*, 28 Pa. St. 329; *Miss., etc., R. R. Co. v. Harris*, 36 Miss. 17.

A fortiori are the above observations true where a person in whose name stock of a corporation stands takes an active part in its affairs, votes at the corporate meetings or becomes a director. *Haywood v. Bryan*, 6 Jones L. (N. C.) 82; *Pittsburgh, etc., R. R. Co. v. Stewart*, 41 Pa. St. 54; *Greenville, etc., R. R. Co. v. Coleman*, 5 Rich. L. 118; *Graff v. Pittsburgh R. Co.*, 31 Pa. St. 439; *Hays v. Pittsburgh, etc., R. Co.*, 38 Pa. St. 81; *Dayton, etc., R. R. Co. v. Hatch*, 1 Disn. 84; *Chase v. Merrimack Bank*, 19 Pick. 564; *Hagar v. Cleveland*, 36 Md. 476; *Harrison v. Heathorn*, 6 Mann & G. 81; *Chaffens v. Cummings*, 37 Me. 76; *McCully v. Pittsburgh, etc., R. Co.*, 32 Pa. St. 25; *Sewell's Case* L. R., 3 Ch. 181.

Or where he pays the calls that are made upon his stock. *Hall v. U. S. Ins. Co.*, 5 Gill. 484; *Miss., etc., R. Co. v. Harris*, 36 Miss. 17; *Frost v. Walker*, 60 Me. 468; *Hull Flax and Cotton Mill Co. v. Wellesby*, 6 H. & N. 38.

"The defendant," said Lord Chief Baron Alexander, in *Cramford Ry. Co. v. Lacey*, 3 You. & Jer. 84, "pays several calls, claims the benefit and takes advantage of the act, and by so doing gives a color to it. It is impossible to say that many individuals may not have been induced to subscribe under the influence of his example. He has acted and held himself out to the world as a proprietor and after such conduct cannot now say that he is not a proprietor."

So where one receives dividends declared upon stock held by him. *Southwaite's Case*, 3 DeG. & Sm. 258; *Hoare's Case*, 2 Johns & Hem. 229 (but see *Ness v. Angas*, 3 Exch. 805; *Ness v. Armstrong*, 4 Exch. 21). For in the latter case he becomes doubly liable, having by his receipt of the profits brought himself within the maxim "*Qui sentit commodum sentire debet et onus.*"

And see generally as to other acts which will fix a stockholder's liability the following cases: *Schenectady, etc., Co. v. Thatcher*, 11 N. Y. 102; *Stratton's Exr's Case*, 1 DeG. M. & G. 576; *Stace & Worth's Case*, L. R., 4 Ch. 682; *Bank of Hindustan v. Alison*, L. R., 6 C. P. 54.

After some fluctuations of opinion it has at length been decided in England that the mere fact of belonging to a provisional committee appointed to organize a corporation will not fix liability as a stockholder. *Reynell v. Lewis*, 1 M. & W. 517; *Norris v. Cottle*, 3 H. L. Cas. 647; *Robert's Case*, 2 Mac. & G. 192; *Maitland's Case*, 8 Geff. 28. But see *Hutton v. Upfell*, 2 H. L. Cas. 674; *Ex parte Bosley*, 2 Mac. & Gord. 176.

The practical result of the authorities cited above may be summed up thus: Any person who by his own act or deed has held himself out to the world as stockholder in a corporation will not be allowed to deny his liability as such. The wisdom of this rule is obvious and it is supplemented by another of equal wisdom and importance. This is, that a person registered as a stockholder shall not be enabled to escape liability by showing that, in consequence of a private arrangement with a third person or with a corporation, he is not the absolute owner of the stock and therefore not liable as such. *Stanley v. Stanley*, 26 Me. 191; *Skowhegan Bank v. Cutler*, 49 Me. 315; *State v. Ferris*, 42 Conn. 460; *Franklin v. Neate*, 13 M. & W. 481; *Burr v. Wilcox*, 22 N. Y. 551.

He cannot therefore escape liability by showing that he is merely a trustee for a third person in whom the beneficial title is vested, or that he merely holds the stock as collateral security for money loaned to the real owner. *Mitchell's Cas.* L. R., 9 Eq. 363; *Holt's Case*, 1 Sm. (N. S.) 389; *Md.'s Case*, L. R., 7 Ch. 485; *Hoare's Case*, 2 Johns & Hem. 229; *Heming v. Maddick*, L. R., 9 Eq. 175; *Ex parte Oriental Comm. Bank*, L. R., 3 Ch. 791; *Chapman & Baker's Case*, L. R., 8 Eq. 361; *Newry R. R. Co. v. Boss*, 14 Beav. 164; *Roosevelt v. Brown*, 11 N. Y. 149; *Creese v. Babcock*, 10 Metc. 545; *Hale v. Walker*, 31 Iowa, 344; *Magruder v. Colston*, 44 Mo. 349. But see *McMahon v. Macey*, 51 N. Y. 155, and *Guest v. R. R. Co.*, 38 L. S. (C. P.) 23.

The following remarks by Lord Romilly on *Mitchell's case*, *supra*, explain the whole law on this point: "One person may, if he pleases, become trustee for another. He knows the consequences of so doing. He knows that he becomes personally liable for the calls, and that he is personally liable to be made a contributory. There are two sets of rights: one is as between himself and the person whom I may call the *cestui que trust*, and the other is as between himself and the company. As between himself and the company he is a shareholder and a contributory and cannot resist anything; but as between himself and the person for whose benefit he agreed to take them he has a right over as against him; that is to say he has a right to call upon him who is the real owner of the shares to make good any sums of money which he may have to pay for the calls or for contribution or the like." And the reason of the law is clear. Persons dealing with a corporation are entitled to put faith in the list of contributories exhibited to them, and to consider those contributories themselves as the real parties in interest. It would be intolerable were every one dealing with a corporation bound to investigate the secret equities attached to the ownership of each share of stock.

This principle applies directly in cases like the principal one, where a stockholder holds stock in a corporation as collateral for money loaned to the corporation. He will not in such case be entitled to set up these circumstances as a defence against creditors. *Wheelock v. Kost*, 77 Ill. 396; *Pullman v. Upton*, 96 U. S. 329; *Nat. Bank v. Case*, 99 U. S. 623; *The Empire City Bank*, 18 N. Y. 200; *Adderly v. Storm*, 6 Hill, 624; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Grew v. Breed*, 10 Metc. 569.

In some states acts have been passed which relieve the holder of stock as collateral from liability thereon. An act to this effect was construed differ-

ently from the similar act in the principal case in *Matthews v. Albert*, 34 Md. 527.

Upon similar grounds to the cases stated above, it has been decided that an agreement to subscribe to stock merely for the purpose of inducing others to do so is contrary to the policy of the law, and that any person so subscribing will be held liable for the full amount of his subscription. *White Mt. R. R. Co. v. Eastman*, 84 N. H. 124; *Blodgett v. Morrill*, 20 Vt. 509; *Bredger's Case*, L. R., 9 Eq. 74; *Pickering v. Templeton*, 2 Mo. App. 225; *Litchfield v. Church*, 29 Conn. 187; *Downie v. White*.

And so in case of any private arrangement between the corporation and a subscriber whereby his liability upon his shares is made less onerous than it appears on its face to be. *Robinson v. Pittsburgh, etc., R. R. Co.*, 83 Pa. St. 334; *New Albany, etc., R. R. Co. v. Slaughter*, 10 Ind. 218; *Blodgett v. Morrill*, 20 Vt. 509; *County of Morgan v. Allen*, 103 U. S. 498.

A corporation cannot therefore agree with a purchaser of unpaid stock that it shall be considered as paid in full. *Dent's Case*, L. R., 15 Eq. 407; unless indeed the corporation has received the full par value in money or money's worth.

The foregoing observations on the liability of stockholders have been made from a somewhat different point of view from that taken in the principal case. It has been viewed from the standpoint of estoppel rather than on the ground of contract. With regard to the rights of creditors and others of and by themselves, rather than as worked out through the rights of the corporation, it is believed that while each of these methods of considering the subject has its advantages, the one adopted is the more satisfactory and scientific. It has received the approbation of Seymour Thompson, in his excellent treatise on the Liability of Stockholders, to which the reader is referred for a full discussion of the points treated of in the foregoing note.

THE BUFFALO AND JAMESTOWN R. R. CO., RESP'T.,

v.

GIFFORD, APPLT.

(*Advance Case, New York. Jan. 17, 1882.*)

Prior to the filing of plaintiff's articles of association defendant subscribed for shares of its capital stock, and thereafter paid two instalments of ten per cent. each upon his subscription, pursuant to calls by the company. *Held*, That the subscription was valid and binding, and became so on the payment of the first instalment.

It is not absolutely necessary to its validity that the subscription be made in a book provided by the directors for that purpose. If the directors adopt one provided by some one else, every purpose of the statute is satisfied.

R. P. Marvin, for Appellant.

Grover Cleveland, for Respondent.

EARL, J.—This action was commenced to recover of the defendant the balance of a subscription made by him, to the capital stock of the plaintiff. He was defeated at the trial term and the judgment against him was affirmed at the General Term. The able opinions delivered in the court below are so full and satisfactory

that we could rest our decision here upon them. But the very earnest argument of the learned counsellor who appeared for the appellant before us, at an age which few reach, and fewer still contend in a judicial forum, has induced us to give the case more careful consideration than we would otherwise have deemed necessary.

The principal contention of the defendant is that he never made a legal subscription to the stock of the plaintiff, and hence could not be compelled to pay any portion of the sum claimed from him. The main facts bearing upon his subscription are as follows: The plaintiff is a corporation organized under the general railroad act of 1850. Its articles of association were filed March 23, 1872, and it thereby became a corporation. The defendant was not one of the incorporators named in those articles. A short time before the organization of the plaintiff, the defendant, with other persons residing at Jamestown, for the purpose of aiding and encouraging the construction of the contemplated railroad subscribed the following instrument in a small pocket memorandum book in which it was written, to wit: "We, the undersigned, in consideration of and for the purpose of becoming stockholders in the Buffalo and Jamestown R. R. Co., do hereby subscribe, and take the number of shares, of one hundred dollars each share, of the capital stock of said company, set opposite our respective names, and agree to pay therefor in such time and manner as required by said company.

No. of shares.	Amount.
Horace H. Gifford, 10.	\$100.00."

The subscriptions were obtained by one Allen residing at Jamestown, who afterward became a director of the company. After the organization of the company the name of the defendant was entered upon its stock ledger, as a stockholder, for the ten shares subscribed by him, and the company, from time to time, made calls of instruments upon its stock, and prior to the time for the payment of each instalment, a notice was sent to the defendant and each of the other stockholders, of which the following is a blank form:

"SIR:—You are hereby notified that a call of — per cent. has been made on the subscriptions to the capital stock of the Buffalo and Jamestown R. R. Co. payable on or before the — day of —, at this office.

"Respectfully yours,

"PETER C. DOYLE,
"Secretary."

At the same time the secretary of the company conferred upon the cashier of a bank at Jamestown authority to receive payment of the calls from stockholders residing there, and for that purpose sent him receipts to be delivered to those paying, of which the following is a blank form:

"BUFFALO —, 1872.

"Received of, ——— dollars, being — per cent. on his subscription to the capital stock of the Buffalo and Jamestown R. R. Co.,

"PETER C. DOYLE,

"Secretary.

"N. B.—All receipts must be returned to the treasurer before the stock can be issued."

Allen then being a director of the plaintiff delivered the book in which defendant had made his subscription as above stated to the cashier that he might receive payment of the subscriptions contained therein, and in response to the calls defendant paid upon his subscription ten per cent., June 15, 1872, and another instalment of ten per cent. in December thereafter, and took from the cashier a receipt for each payment in the form above given. After the last payment he refused to pay further instalments, and this action was brought to recover the balance of such instalments.

Upon these facts it is to be determined whether the defendant made a subscription to the stock of the plaintiff which bound him. It cannot be doubted that there was enough to make a valid contract of subscription upon common law principles. While the subscription was not valid and binding before the complete formation of the corporation, because there was no party with whom the defendant could then contract, yet after the corporation was formed it accepted the subscription and recognized the defendant as a stockholder, and he recognized himself as a stockholder, and ratified and confirmed his subscription by payments thereon. He thus, within all the authorities upon general principles, became a stockholder in the company liable to pay the full amount of his subscription. *Upton v. Tribilcock*, 91 U. S. R. 45; *Webster v. Upton*, 91 U. S. R. 65; *Buffalo and N. Y. City R. R. Co. v. Dudley*, 14 N. Y. 336.

But the claim of the defendant is that the subscription, while valid, if governed by the common law alone, is invalid under the general railroad act, chapter 140 of the laws of 1850. Sec. 1 of that act provides that the persons who subscribe the articles of association, and "all persons who shall become stockholders in such company shall be a corporation." If there were no other provision in the act, and the persons who subscribed the articles of association did not subscribe for all the stock, the balance thereof could be taken by any persons who would make a valid common law subscription for the same, and pay the ten per cent. required in the act, and thus when this defendant paid the first instalment in June, 1872, and at that time ratified his prior subscription, it became from that time a valid subscription. The learned counsel for the appellant claims that other persons than those who signed the articles of association could become stockholders only in the mode prescribed in sec. 4, which provides as follows: "When such articles

of association and affidavit are filed and recorded in the office of Secretary of State, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places, and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber shall pay to the directors ten per cent. of the amount subscribed by him in money, and no subscription shall be received or taken without such payment." The precise purpose of this section is not apparent. The directors would, in the absence of such a provision, be authorized to open books of subscription for the purpose of filling up the capital stock. The section may have been drawn by the person who prepared the statute without a definite idea of its utility or necessity. It does not prohibit or forbid any other mode of subscription, and it is not perceived that any public policy would be subserved by holding that any subscription valid at common law is invalid by this section of the statute, and we are inclined to the opinion that it was not intended by this section to prescribe a fixed statutory mode of making a subscription, and that any contract of subscription good and valid at common law is still valid notwithstanding this section.

But we are also of the opinion that there was a substantial compliance with the statute. The statute does not point out how or where the books of subscription shall be opened, or what kind of books shall be used. Within the meaning of the statute there may be one book or many, and they may be large or small. This book was opened for subscriptions before the organization of the company, and the defendant and others made their subscriptions therein. After the organization of the company the subscriptions in that book were adopted by the company, and the persons therein named were entered as stockholders upon the stock ledger of the company. They were called upon to pay instalments upon their subscriptions, and they paid the same to the agent of the plaintiff to whom the book had been delivered by one of the officers of the company for the purpose of receiving payment of subscriptions thereon, which such officers thus recognized as valid. After such payment had been made the book was returned to Allen, the director, who retained it until his death, and after his death possession of it was taken by the company. Suppose all the stockholders who did not sign the articles of association had, before the articles were filed, signed their names in this book, and after the organization of the company the directors had taken the same, and recognized the subscriptions therein as valid subscriptions, and they had been recognized and ratified by the subscribers by payments thereon. Could it be doubted that such a book would be a book of subscriptions opened by the directors within the meaning of the statute? • The

statute can mean no more than that the subscriptions are to be made in a book provided by the directors for that purpose, and if they adopt one some one else has provided every purpose of the statute is ratified.

Very little light is thrown upon this question by the adjudications, and we will not therefore refer to them at large. They are sufficiently referred to and commented upon in the opinions pronounced in the court below. As will be seen by the following authorities, none of which are, however, directly in point, judicial expressions are not entirely harmonious. *Hamilton and Deaneville Plank Road Co. v. Rier.*, 7 Barb. 157; *Troy and Boston R. R. Co. v. Tibbitts*, 18 Barb. 310; *Erie and N. Y. City R. R. Co. v. Owen*, 32 Barb. 616.

In the articles of association filed for the incorporation of the plaintiff it was stated that the road was to be constructed, maintained and operated from the city of Buffalo to a point on the state line between the states of New York and Pennsylvania. The road was actually built from Buffalo to Jamestown, and the remainder of the line designated from that place to the state line, being about twelve miles, was not constructed. And it was found by the judge at the Special Term that before the commencement of this action, "the building and construction of the part thereof lying south and beyond the village of Jamestown, was by said company given up and abandoned." There was no proof or finding that that section of the road had been legally or formally abandoned by the company. The proof simply showed that the company stopped the construction of its road southerly at the southerly line of Jamestown about the 1st of October, 1875. It does not appear that the company took any action that disabled it from extending its road to the state line. Under such circumstances it cannot be claimed that the defendant was released from payment of his subscription by any omission of the company to construct its road to the state line, or by any alleged abandonment of any portion of its road.

In October, 1873, the plaintiff executed a mortgage upon its road which in 1876 and 1877 was foreclosed, whereby the railroad and its franchises were sold to purchasers who took possession of the road and its franchises. All of the foreclosure proceedings took place after the commencement of this action, and they do not furnish a defence thereto. The plaintiff, by these proceedings, was not deprived of its unpaid subscriptions. They continued part of its assets for the benefit of its stockholders and creditors, and no reason can be perceived for holding that the defendant should not pay the balance of his subscription. The case of the *Lake Ontario Shore R. R. Co. v. Ortiss*, 80 N. Y. 219 does not sustain the claim of the defendant that the foreclosure proceedings furnish him a defence. In that case the contract sued upon was not one of sub-

scription to plaintiff's stock. It was simply a promise that the defendant would subscribe upon certain conditions to be performed, and those conditions were not performed by the plaintiff, and it was in no condition to perform them, and for reasons stated in the opinion, which do not apply to this case, the plaintiff was defeated.

We are therefore brought to the conclusion that no error was committed in the court below, and that the judgment should be affirmed with costs.

"All concur."

LITTLE ROCK AND NAPOLEON RAILROAD CO.

v.

LITTLE ROCK, MISSISSIPPI RIVER AND TEXAS R. R. CO.

(38 *Arkansas Reports*, 663. *November Term*, 1880.)

The act of twelfth of January, 1853, creating the Little Rock and Napoleon Railroad Company, is a public act, of which the courts will take judicial notice; and by it the company was immediately created a corporation; and having, in good faith, commenced the construction of its road before the adoption of the constitution of 1874, its charter was not revoked by section 1, Article XII., of that constitution.

[The principal question decided in this case is, that railroad companies are subject to the same rules of estoppel as individuals. Upon the facts the appellant is held to be estopped to oppose the appellee's construing its road upon the line of the appellant. The facts constituting the estoppel are too numerous to be included in a syllabus, and the reader is referred, for them, to the case.—REPORTER.]

Appeal from Pulaski Chancery Court.

Hon. David W. Carroll, Chancellor.

John McClure, for appellant:

Legislative action essential to exercise of railroad franchises. *The State v. B., C. & M. R. R.*, 25 Vt., 433; *Newburg Turnpike v. Miller*, 5 John. Chan., 101; *Auburn v. Cato Plk. Road*, 9 N. Y., 444; *McCandley's Appeal*, 70 Pa. St., 210; *Atkinson v. M. & C. R. R.*, 15 Ohio St., 21.

And when one grant only is made it is in its nature exclusive. *Raritan & Delaware R. R. v. Delaware & Raritan R. R.*, 18 N. J. Eq., 568. And prior grant gives prior right of selecting land. *Canal Co. v. Railroad Co.*, 4 Gill & John., 1.

The act of twelfth of Jan., 1853, sec. 21, gave 99 years to locate the road, in absence of any subsequent grant. This no monopoly. *Tuckahoe Canal Co. v. Tuckahoe R. R.*, 1 Leigh., 42.

Appellant's road not within provisions of sec. 1 art. 12, const. of 1874. *Hammet v. L. R. & Nap. R. R.*, 20 Ark., 207. Be

sides, it is a vested right under const. of U. S. Dartmouth College v. Woodward, 4 Wheat., 418; Binghamton Bridge case, 3 Wall., 51. Neither courts of law, nor of equity can limit time for completion when charter does not. Thicknesse v. Lancaster Coal Co., 1 Eng. Ry. Ca., 627; Heard v. Talbot, 7 Gray, 119.

Action lies against defendant by the assumed name. Newton Co., etc., v. Nofringer, 43 Ind., 566; Paulman v. Sweet, 1 Chand. (Wis.), 337.

The corporate existence of defendant road interfering with the franchises of appellant, may be questioned. Cases above cited from 3 Wall., 51; 15 Ohio St., 21; 18 N. J. Eq., 572. Also, Com. v. P. & C. R. R., 24 Pa. St., 160; Boston W. Co. v. B. & W. R. R., 16 Pick., 526; Denver & S. Ry. v. Denver City R. R., 2 Col., 679; Piper v. Rhodes, 30 Ind., 309; Slocum v. Providence, 10 R. I., 114; O. V. & R. R. v. Plumas Co., 37 Cal., 360; Gas Co. v. Gas Co., 27 La. An., 138; Elizabeth City v. Lindley, 6 Iredell, 479; Tar Navigation Co. v. Neil, 3 Hawkes, 537; Bigelow v. Gregory, 73 Ill., 201; Patterson v. Arnold, 45 Pa. St., 81; A. & O. R. R. v. Sullivan, 5 Ohio St., 279; People v. Chambers, 42 Cal., 201; Jersey City Gas Co. v. Dwight, 29 N. J., 242; Brooklyn, etc., R. R., 72 N. Y., 245; ib., 75 N. Y.; Boston & L. R. R. v. Salem & L. Railroad, 2 Gray, 1.

Injunction the proper remedy. Boston A. Co. v. B. & W. Railroad, 16 Pick., 526; 1 Am. Ry cases, 274; Com. v. P. & C. Railroad, 24 Pa. St., 160; Newburg Co. v. Millar, 5 John Chan., 101; Sto. Eq. Ju., secs. 925, 926, 927; Stewart's Appeal, 56 Pa. St., 442.

May be at suit of any one injured specially, or about to be, other than stockholders and contractors. D. & S. Ry. Company v. Denver City Ry. Company, 2 Col., 679; Piper v. Rhodes, 30 Ind., 309; O. V. Railroad v. Plumas Company, 37 Cal., 354; Slocum v. Providence, etc., 10 R. I., 114.

Any one whose rights are affected may question the constitutionality of an act. Atkinson v. Marietta & Cincinnati Railroad, 15 Ohio St., 21; Gas Company v. Gas Company, 27 La. An., 138.

Defendant being wrong, cannot show forfeiture of plaintiff's charter. Pennsylvania Railroad v. National Railway, 23 N. J. Eq., 464-5; Elizabeth City v. Lindley, 6 Iredell, 479; Tar Navigation Company v. Neal, 3 Hawkes, N. C., 537.

"Non user" or "abandonment" of complainant's franchises, cannot be set up until forfeiture declared. West v. Carolina Insurance Company, 31 Ark., 476. Answer must show when and how corporate rights ceased. Heaston v. Cincinnati Railroad, 16 Int., 276; Brookville Turnpike Company v. McCarty, 8 Int., 392;utherland v. L. & M. Plank Road, 19 Ind., 192.

Complainant's charter a public law. No abandonment shown.

Raritan Water Power Company v. V., 21 N. J. Eq., 479, 80; *Morris & Essex Railroad Company v. Blaine*, 1 Stock., N. J., 648.

Agreement to transfer does not affect legal existence of corporation, nor actual transfer of all its property. *Hays v. Ottawa Railroad Company*, 61 Ill., 42; *Abbott v. Rubber Company*, 33 Barb., 587; *Burke v. Smith*, 16 Wall., 395; *Penobscot Railroad Company v. Dunn*, 39 Me., 587; *Bedford Railroad Company v. Bowser*, 48 Pa. St., 29. Directors cannot transfer—cases *supra* and *Field on Corporations*, pp. 169–70—unless for purposes consistent with objects of corporation. *Kean v. Johnson*, 1 Stock., N. J., 401; *Black v. Delaware Railroad Company*; 7 C. E. Green, N. J., 130; *ib.*, 9; *ib.*, 455; *Como v. Port Henry Iron Co.*, 13 Barb., —.

Charter gave no power to sell. If it existed, it must have been exercised by all the stockholders. *Kean v. Johnson*, 2 Stock., 401. Defendant had no power to purchase, and no estoppel grows out of void acts. *Edwards v. Evans*, 16 Wis., 185.

Assignment of property was not evidence of abandonment or surrender of franchise. *Boston Glass Manufacturing Co. v. Langdon*, 24 Pick., 52.

Distinction between corporations by special charter, and under general laws. Latter must be proved to exist, if denied. *Hammett v. L. R. & Nap. R. R.* 20 Ark., 207; *Bigelow v. Gregory*, 73 Ill., 201; *Patterson v. Arnold*, 45 Pa. St., 81; *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal., 424. Certain acts must be done as conditions precedent of corporate existence. *A. & O. R. R. v. Sullivan*, 5 Ohio St., 279; *The People v. Chambers*, 42 Cal. 201; *ib.*, 4 Am. Ry. Rep., 49. No terminal points shown in the articles of association.

A preliminary survey was necessary to existence of defendant company. Act of July, 1868; also, map and profile. What is a "survey"? See *Attorney General v. Stephens et al.*, 1 Sux., N. J., 384; *Morris & Essex R. R. v. Blan.*, 1 Stock., N. J., 644; *Hetfield v. Central Railroad*, 5 Dutch, 574. Conditions must be fulfilled before corporate rights vest. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq., 242. Requirements of affidavit not fulfilled. *B. & P. R. R. Co. v. Hatch*, 20 N. Y., 160; section 4919 *Gantt's Digest*. As to other requirements, reference made to *The People v. Chambers*, 42 Cal., 201; *The People v. S. & V. R. R.*, 45 Cal., 314; *Unity Ins. Co. v. Cram*, 43 N. H., 636; *Harris v. McGregor*, 29 Cal., 127; *Williams v. Franklin Association*, 26 Ind., 316; *Bedit v. Harris et al.*, 4 Minn., 513; *DeWitt v. Hastings*, 69 N. Y., 522; *Abbott v. Omaha Co.*, 4 Neb., 416; *Fields v. Cook et al.*, 16 La. An., 154; *Childs v. Smith*, 55 Barb., 52.

Against non-performance of these conditions, equity cannot relieve. *Davis v. Gray*, 16 Wall., 229–30; *Bigelow v. Gregory*, 73 Ill., 197.

But section 4 of act of July 23, 1868, would not, even if conditions had been performed, have authorized defendant corporation to construct, operate or maintain a railroad. See section —, also sections 5 and 22, for the full powers. The defendant could take no other powers than the original mortgagor had. They purchased under judicial sale, and got no powers. *Carey v. Cincinnati R. R.*, 5 Iowa, 366.

A statutory forfeiture requires no judicial declaration. The right vests in the state immediately on the event. *Oakland R. R. v. O. V. R. R.*, 45 Cal., 365; *Silliman v. F. O. & C. R. R.*, 27 Gratt., 119; 17 Am. Ry. Rep., 157; 5 ib., 148; *The U. S. v. Grundy*, 3 Cranch, 151; *Kennedy v. Strong*, 14 Johns., 129; *N. Y. R. R. v. Boston R. R.*, 36 Conn., 196; *D. & E. R. R. v. Beross*, 39 Ind., 598; 10 Am. Ry. Repts., 382; *Wilds v. Serpill*, 10 Gratt. (Va.), 405; *Hale v. Bronsann*, 10 Gratt., 418; *Staats v. Board*, ib., 400; *Brooklin Winfield v. Newton Ry. Co.*, 72 N. Y., 245.

Recognition of defendant by legislature does not affect the question. It had no power to create by recognition—only by general law.

Act of July 23, 1868, prohibited incorporation of any railroad within ten miles of complainant's route. Section 21.

The act of 1879 in conflict with section 25, Art. V., Const. of 1874.

Legislative recognition invalid for want of grantee. *O. & V. R. R. Co. v. Plumas Co.*, 37 Cal., 355; *Brooklin Winfield v. Newton R. R.*, 75 N. Y., —. It cannot revive what is gone. *The People v. Manhattan Co.*, 9 Wend., 351; *The People v. Kingston Turnpike Co.*, 23 Wend., 193.

Act of 1879 further in violation of Article XII., sections 2 and 6, and Article X, sections 25 and 26, Const. of 1874.

Recognition of governor and state officers of no avail. *The People v. The Phoenix Bank*, 24 Wend., 431-2. Besides, the recognition was under an unconstitutional act. *The State v. L. R., P. B. & N. O. R. R.*, 31 Ark., 702.

What powers did defendants obtain by purchase under sale?

Franchises cannot be mortgaged without legislative authority. *The Commonwealth v. Smith*, 10 Allen, 448; *Atkinson v. Marietta R. R.*, 15 Ohio St., 21; 1 Jones on M., section 124.

Conceding that the franchise may have been susceptible of mortgage, what passed? The entire surveyed line of railroad within surveyed limits. *Eldredge v. Smith*, 34 Vert. 484, 92; *Vermont Central R. R. v. Burlington*, 28 Vert., 196. No map, surveys, nor deeds had been filed showing the line. There was nothing ascertained for the operation of the mortgage. *Seymour v. Canandaigua Railroad*, 23 Barber, 306. Corporate right to make survey did not pass by sale. *Chaffer v. Hudeling*, 27 La. An., 608; *Randolph and Delaware Railroad v. Delaware and Randolph Railroad*, 18 N. J.

Eq., 559; 20 Am. Railway Reports, 423; Col. v. C. P. and I. Railroad, 10 Ohio St., 385; Union Pacific Railroad v. Lincoln Co., 1 Dillon, 325.

Again, defendants acquired no rights at foreclosure sale because no portion of the work was done in five years, and it was not completed within ten. *Silliman v. Fredericksburg Railroad*, 27 Gratt., 126; sec. 3417 Gantt's Digest.

It was the main line, not the branches, which should have been completed to fulfil the requirements of the act. There was no corporate existence when the foreclosure decree was rendered. Act of July 23, 1868. Complainants not parties to that decree and not estopped.

Acting as such, does not make a corporation de facto. *DeWitt v. Hastings*, 40 N. Y. Sup. Ct., 463; *ib.* 69 N. Y. 518; U. S. Digest, vol. 7, p. 178. Under general act corporation cannot be created by estoppel. *Boyce v. Methodist Church*, 46 Md., 372.

The transfer of stock to those who reorganized complainant company did not require, as between parties, the approval of the company. *Duke v. Cahawba Nav. Co.*, 10 Ala., 82; *Chambers Ins. Co. v. Smith*, 11 Pa. St., 120; *Choteau Springs Co. v. Harris*, 20 Mo., 382; *Eames v. Wheeler*, 19 Pick., 442; *Stone v. Hackett*, 12 Gray, 227; *Bargate v. Shortridge*, 31 Eng. Law and Eq., 44.

Act of July 23, 1868, unconstitutional from divers defects, and irregularities in its passage.

The same contended with regard to the act of December 9, 1874.

Last act unconstitutional also, because it endeavors to confer corporate powers upon mere purchasers, not incorporate, nor required to become so. Const. of 1874, Art. XII, secs. 2, 6; *State v. Shermon*, 15 Ohio St.; also because it is a special act. Const. of 1874 (*supra*); *Atkinson v. M. and C. R. R.*, 15 Ohio St., 36; *San Francisco v. S. V. W. W.*; 48 Cal., 494; also because it revived forfeited corporate rights, without attaching proper conditions. Const. of 1874, Article XII, sec. 1; Art. XXII, sec. 8; *Brooklin Winfield v. Newton R. R.*, 72 N. Y., 245; *ib.*, 75 N. Y.

Also for other reasons.

Waiving, however, all objections to the organization of the L. R., P. B. and N. Orleans Co., or to defendant or its successor by purchase, corporate property cannot be lost or forfeited by non user, any more than corporate franchise, without judicial declaration. *Austin v. Webb*, 8 Ohio, 548. The resolution of July 10, 1869, is only a license to enter, but no evidence of adverse title, or right to hold. *Floyd v. Ricks*, 14 Ark., 286; *Blakeny v. Ferguson*, 20 Ark., 560; *Burke v. Hale*, 7 Ark., 329. A grant cannot be divided. Statute of limitations does not bar occupation of the line between Pine Bluff and Little Rock. *Angell on Lim.*, sec. 401, p. 402.

The supposed conveyance to defendant company was void, and

had only the effect of an estate at will. Sec. 2960 Gantt's Digest. It was without consideration, and works no estoppel. Nor does the action of individual stockholders in standing by, or aiding defendants to build their road.

The purchase, under the foreclosure sale, was made by Huntington and Adams, who took the deed. No conveyance is shown from them to defendant company. It has no title. *Leffingwell v. Elliott*, 8 Pick., 456.

Huntington, for appellees:

Complainants must show: First, exclusive right, and second, disturbance by defendants.

The right must depend on statute, and must be clearly granted. *Charles River Bridge v. Warren Bridge*, 11 Peters, 420. All doubt is in favor of the state. *Mills v. St. Clair Co.*, 8 Howard, 569; *Perrine v. The Chesapeake and Del. Canal Co.*, 9 Howard, 172; *R. Fred. and Pot. R. R. Co. v. Lisbon R. R. Co.*, 13 Howard, 71; *Minturn v. Larue et al.* 23 How. 435; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Turnpike Co. v. The State*, 3 Wall. 210.

The same principle adopted by numerous state courts. 27 N. Y. 87; 6 Paige, 554; 3 Sandf. Ch. 625; 16 N. J. Eq. 321; 2 Beasley, 46, 503; 16 N. J. Eq. 419; 5 Cush. 375; 2 Gray, 1; 21 Vt. 590; 27 ib. 140; 4 Zab. 87; 14 Ill., 314, 273; 13 Ind. 90; 11 Leigh. 42; 11 La. 253; 4 Mich. 361; 9 Watts, 9; 52 Penn. St. 506; 13 Penn. St. 555; 2 Porter, 296; 9 Georgia, 517, 213; 31 Mississippi, 679; 51 ib. 335; 5 Ohio St. 528; 3 Head. 596; 21 Conn. 294.

Same rule in England. 2 Barn. & Ad. 792; 7 Mann. & G. 253.

The charter of complainant does not contain such exclusive grant.

If it existed between Little Rock and Napoleon, it would not follow that it existed against a road from Little Rock by Pine Bluff and thence in a direction different from Napoleon. *People v. Albany and Vt. R. R. Co.*, 24 N. Y. 261; *Richmond, F. and P. R. Co. v. Louisa R. R. Co.*, 13 Howard, 71; *Tuckahoe Canal Co. v. T. and L. R. Railway*, 11 Leigh. 42; *Pontchartrain Railway Co. v. N. O. and L. P. Railway*, 11 La. 253; *B. and L. R. R. Co. v. B. and M. R. R. Co.*, 5 Cush. 375; *B. and L. R. R. Co. v. S. and L. R. R. Co.*, 2 Gray, 1.

And the exclusive right granted, must remain, in possession and enjoyment. Kent's opinion in *Livingston et al. v. Van Ingen*, 9 Johns. 507; High. on In., sec. 573, p. 320.

Acts of complainant showed an intention to abandon all its rights and franchises to defendant, or its parent Company. It is now estopped from demanding this injunction by acquiescence and laches.

The claim is stale. *Smith v. Clay*, adm. 645. *Silliman v. Railroad Company*, 94 U. S. 811; and authorities there cited by Mr.

J. Swayne. Also 21 N. J. Eq., case 283; 20 ib. 530; 1 Railway and C. cases, 68; 3 Milne and Craig, 784, 711, 730; 2 Railway and Company cases, 187; 18 Vesey, 515; De Gex. M. and G. 341; 2 Sim. N. S. 78; Johnson, 500; 11 Jur., N. S. 192; 7 Vesey, 230; 5 Johnson Ch., 268, 272; 18 Ohio St. 169; 43 Iowa, 301; 6 Allen, 52.

This abandonment brought complainant in the purview of section 1, Article XII, constitution of 1874, and it became dissolved. It amounted, if not to a transfer, at least to a surrender of all its rights and franchises, which is permissible. Angell and Ames on Cor., 772, and cases cited; State of Ohio v. Sherman, 22 Ohio St. Rep., 411, 428; Railroad Company v. Georgia, 98 U. S. 359; Clearwater v. Meredith, 1 Wall. 25; State v. Bull, 16 Connecticut, 179.

The charter only gave complainant a reasonable time to avail itself of the grant, not a perpetuity. 24 N. Y. 261; Railway Company v. Philadelphia, 101 U. S. 528, 539; Wright v. Nagle, 101 U. S. 791; Stone v. Miss. ib. 814.

As to defendant, its existence as a corporation can only be inquired of by the state. 31 Barb. 258; 16 Ala. 372; 27 Penn. St. 380; 26 N. Y. 75; 20 Ark. 204, 443, 495; 31 ib. 476; 58 Penn. St. 399; 16 S. and R. 140; 15 N. H. 162; 32 Ill. 79; 1 Md. Ch. Dec. 107; 4 Gill. and J. 1, 121; 9 ib. 365, 426; 35 Mo. 190; 12 Conn. 7; 22 Cal. 434; 24 Vt. 465; 7 Grattan, 352; 9 Wend. 351; 2 McMull. 439; 24 How. 278; 10 Otto, 55; Red. on Railways, vol. 1, sec. 18, pp. 63, 66; Angell and Ames on Cor., secs. 635, 636.

Not such irregularities in acts, relied on by defendant as to render them void. Vinsant, Adm. v. Knox, 27 Ark. 266, 278; English v. Oliver, 28 Ark. 317; Worthen v. Badgett et al., 32 Ark. 496; Smithee Com. v. Garth, 33 Ark. 1.

Evidence shows that this suit is not prosecuted by proper authority of complainant company, even if it is still in existence.

Clark and Williams, for appellees.

Grant to complainants did not give exclusive right to build on any route. 1 Red. on Railways, 257, 258, sec. 8; Charles River Bridge v. Warren Bridge, 11 Pet. U. S. 420; Thorpe v. Rutland and Burlington Railroad Company, 27 Vt., 140; B. and L. Railway, v. S. and L. Railway, 2 Gray, 1; M. Bridge Company v. Utica and Sch. Bridge Company, 6 Paige, 554; Hud. and Del. Canal Company v. New York and Erie Railway, 9 Paige, 323 and n. to p. 260.

Corporate existence of defendant implied from legislative recognition. 1 Red. on Railways, p. 56, sec. 19; Dillingham v. Snow, 5 Mass. 547; 2 Kent's Com. 277; 1 Blackstone's Com. 473. But want of right in defendant cannot give right to complainant. 1 Red. on Railways, p. and n. to pp. 2, 3; Bank of Middleton v. Edgerton, 30 Vt. 182; 2 Milne and Keen, 517; 10 Ohio St. 385;

8 Condensed Eng. Ch. 111; 13 Sim. 228; 2 B. and Ad. 646; 3 Cal. Reports, 241.

Corporation de facto sufficient. *Attorney General v. Utica Gas Co.* 2 John. Ch. 371; 2 Vesey's Reports, 314; *Nicholas v. Rochester Bank*, 11 Paige, 118; *People v. Susquehanna Railroad Company*, 55 Barb. 314; *People v. U. Gas Company*, 15 John. 378.

If defendant wrongfully exercising corporate franchise, remedy is by quo warranto. *Angelland Ames on Cor.* 731 to 739; *Corn v. G. and N. Railroad Company*, 20 Penn. St. 518; and the remedy is exclusive. 14 Abbot's Pr. (new series), N. Y. Reports, 191; 10 Barn. and Cres. 230; *Dumbman v. Empire Mills*, 12 Barb. 341; *Wright v. People*, 15 Ill. 417; *Murphy v. Farmers' Bank*, 20 Penn. St. 415; 5 Mass. 230; *Wilcox on Cor.* And can only be prosecuted by leave of court. 5 Baer Ab. "Information" D. p. 180; 2 John. 184, 190; 1 Doug. (Mich.) 59; 12 Penn. St. 365; *Angell and Ames on Corp.* 739.

Existence of defendant valid under act of January 8, 1851, and under the mortgage sale it purchased the right to build the road. *Pacific Railroad Company v. Lincoln Co.*, 1 Dill. 325, 326; *Morgan v. La.* 3 Otto, U. S. 232; *Rover on Jud. Sales*, sec. 516.

Complainant's charter fails to designate any line of road. See Acts. No location has yet been made as required. The charter was forfeited by legislative act expressed in the constitution. Article XII, sec. 1; 1 Green. (Iowa), 553; *State v. Curran*, 7 Eng. 321; 3 Kent's Com. 306; *McLean v. Pennington*, 1 Paige, 107.

Complainant died by non user. *White v. Campbell*, 5 Humph. 37; *Bank v. Petway*, 3 Humph. 522; *Pomeroy v. Bond of Ind.* 1 Wall. 23.

Dissolution may be inferred. *Angell and Ames on Cor.* sec. 144, 573, p. 777; *Woodbridge Union v. Colneys*, 13 Ad. and El. 269; 2 Bacon's Abridg't, Cor. G. pp. 481, 482.

Complainant estopped. 33, Iowa, 422; 11 Ohio St. 516; 26 Wis. 84; *Bigelow on Estoppel*, 501; 1 Bay. (S. C.) 239; 4 Wall. 189. Also barred by limitations. 35 Penn. St. 191; 14 Ark. 246, 261; 15 Ark. 286, 296; 1 McLean, 164; 1 How. 168; 19 Ark. 16, 21; 22 Ark. 272; 21 Ark. 9; 15 La. An. 427; 11 ib. 212.

Defendant has been over seven years in possession under color of title to the whole line. This makes a good bar. 20 Ark. 542; 1 Watts. & Sergt. (Penn.), 505; 13 How., U. S. 472; 18 How. 50; 7 Hill, N. Y. 488; 24 Wend. 611; 18 John., 355; 4 Porter (Ala.), 164; 20 Ark. 508.

L. A. Pindall, for appellees:

Complainant company not represented in this suit by proper authority.

The injunction asked would be highly detrimental to the public, and complainants have adequate remedy by "trespass."

Complainant's charter confers no exclusive right. Red. on Rail., vol. 2, secs. 231, 3 and 10; 11 Peters, 543, 6, 7, 8 and 9; 4 Peters, 562; 13 How. 81; 23 N. J. 445 and 8, 451, 5 and 6; 47 Maine, 189, 208; 13 Ind. 90-02. Therefore it cannot question defendant's legitimate existence, so long as it does not trespass on any exclusive right of complainant company.

Defendant claims existence under the act of December, 1874. The presumption is that the general assembly acted properly in the silence of its journals. 27 Ark. 278, 9, 280 and 1; 28 ib. 319, 20, 21; 32 ib. 419, 422, 516, 520. See also Cooley's Const. Lim. p. 97 and 170.

Legal existence of defendant cannot be questioned in this proceeding. Angell & Ames on Corp., secs. 731 and 777; Field on Corp. sec. 493; 32 Ill. 80 and 82, pp. 108-9-10, 111 and 116; 6 Ill. 667, 671; 8 Indiana, 392; 10 ib. 47; 6 B. Mon. 601; 10 Mo. 123, 129-30; 35 ib. 193; 10 Gill & John. 346, 356; 1 Md. Ch. 107, 110, 111; 2 Doug. (6 Mich.) 124, 125, 140; 46 Barb. (N. Y.) 361, 4, 5; 16 S. & R. 145; 7 Gran. (Va.) 352; 17 Miss. (9 S. & M.) 432; 31 ib. 355; 32 Ga. 273, 291; 15 N. H. 167; 10 ib. 375; 5 Duer (N. Y.), 676; 16 Ala. 372-5-5; 20 Conn. 556; 6 Geo. 131.

Equity cannot declare a forfeiture. 32 Ill. 80; 2 John. Ch. 371; 5 ib. 366; 1 N. J. Ch. 186, 369, 377-8, 384-5; 13 N. J. 47, 57-8; Freeman's Ch. (Miss.) 161, 173; 1 Ed. Ch. (N. Y.) 84-8-9; 8 Humph. (Te.) 252; 44 Barb. (N. Y.) 239; Hop. Ch. (N. Y.) 354.

Any defect cured by grant of lands from state. M., O. and Railroad Company v. V. 20 Ark.; 15 N. H. 168.

Complainants, stockholders, estopped. Red. Am. R. R. Cases, p. 69; 69 Mo. 256. They utterly abandoned all efforts, and transferred, so far as they could, all their rights and powers to defendant, and stood by and encouraged it to spend money.

HARRISON, J. This was a suit in equity by the Little Rock and Napoleon Railroad Company against the Little Rock, Mississippi River and Texas Railway, and Jared E. Redfield—the president—and Dudley E. Jones, Sol. F. Clark, S. L. Griffith, C. F. Penzel, Elisha Atkins, John H. Reed and E. Winchester—the directors thereof, to enjoin the said Little Rock, Mississippi River and Texas Railway from extending and building its railroad between the city of Little Rock and the city of Pine Bluff.

The complaint, which was filed on the ninth day of February, 1880, alleged, in substance, that the plaintiff was incorporated by an act of the general assembly, entitled "an act to incorporate the Little Rock and Napoleon Railroad Company," approved January 12, 1853, and granted the right and franchise to build and operate a railroad from the city of Little Rock to the town of Napoleon;

and that, in the exercise of said right and franchise, it at an expenditure of \$150,000 surveyed and located the road, and cleared and graded part of the track between Napoleon and Pine Bluff, and laid ties along the same.

That certain named persons afterwards, on the twenty-fourth day of November, 1868, under the provisions of the act of July 23, 1868, entitled "an act to provide for a general system of railroad incorporations," which, however, it denied to have been constitutionally passed by the general assembly, or to have become a law, associated themselves together as a corporation by the name of the Little Rock, Pine Bluff and New Orleans Railroad Company, for the purpose of building a railroad from Little Rock to Pine Bluff, and from Pine Bluff in a southeasterly direction to a point on the south boundary of the state, with a branch from Pine Bluff to a point on the Mississippi river near Napoleon—and the said company proceeded to build and put in operation the said branch from Pine Bluff to the Mississippi river—but that it never made any location or survey of the line between Pine Bluff, and Little Rock, or any part of its main line.

That the said branch road was built by said company on the located and established line of the plaintiff between Pine Bluff and Napoleon, which said company took possession of without the consent of the plaintiff, and the work already done upon it was used and appropriated in its construction.

That said company issued and negotiated its bonds, and secured the same by a mortgage on its road, property and franchises; and default having been made in the payment of the interest, Charles Main and other holders of its bonds instituted suit against it in the circuit court of the United States for the eastern district of Arkansas, for foreclosure of the mortgage, and a decree of foreclosure and sale was rendered therein; and afterwards on the tenth day of December, 1875, all its property, including its road-bed, line and franchises were sold under the decree; and that the purchasers thereof, and their associates, under the provisions of the act of December 9, 1874, entitled "an act supplementary to an act entitled 'an act to provide for a general system of railroad incorporation,' approved July 23, 1868" (and which also it denied to have been constitutionally passed by the general assembly, or to have become a law), organized themselves as a corporation by the name of the Little Rock, Mississippi River and Texas Railway, with James E. Redfield as president, and D. E. Jones, S. F. Clark, S. L. Griffith, C. F. Penzel, Elisha Atkins, John H. Reed and E. Winchester as directors, and caused to be filed in the office of the secretary of state the certificate of such organization required by said act. But that the said purchasers and their associates did not so organize themselves as a corporation within one year after the sale, and they did not file the certificate within

six months after their attempted organization ; and that they never did in fact become a corporation.

That the said Little Rock, Pine Bluff and New Orleans Railroad Company did not, as required by the act of July 23, 1868, within two years after the filing of its articles of association in the office of the secretary of state, file therein a preliminary survey of its road, and an affidavit of three of its directors that five per cent. of the stock subscribed had been actually and in good faith paid to the directors, or either—and which five per cent. of the stock subscribed was never paid ; and that it did not within five years after its incorporation expend in the construction of the road ten per cent. of its capital stock ; and other failures to comply with the provisions of the act were stated—whereby it was charged that it had forfeited its franchises, and had at the time of the decree and sale no corporate existence ; and no franchise whatever passed to the purchasers or to them and their associates.

That the said purchasers and their associates, for the reasons mentioned, were not a corporation, but that claiming to be a corporation by the said name of the Little Rock, Mississippi River and Texas Ry., and to have the right and franchise to build and operate a railroad from Little Rock to Pine Bluff, and from Pine Bluff to a point on the Mississippi river near Napoleon, were then locating and building, as a part of their line, a railroad between Little Rock and Pine Bluff, upon or parallel to, and within a distance of ten miles of the line located and adopted by the plaintiff.

That the plaintiff was ready and able, and it was its intention to immediately build and put in operation, its road between Little Rock and Pine Bluff ; but if the said persons or the said Little Rock, Mississippi River and Texas Ry., if it be a corporation, build their or its road, it would by its interference with the trade and business of the plaintiff's road when completed, cause great and irreparable damage and injury to the plaintiff, and as a continuing wrong give rise to a multiplicity of suits. And that the said Little Rock, Mississippi River and Texas Ry. was insolvent and unable to pay any damages that might be recovered against it.

The answer of the Little Rock, Mississippi River and Texas Ry. admitted that the plaintiff located that portion of its road between Napoleon and Pine Bluff, and in the years 1856 and 1857 cleared and graded, at intervals, a small part of the track and placed ties along the same ; but denied that it located or established any part of the line between Pine Bluff and Little Rock, or that it expended in the work anything like the sum of \$150,000.

It alleged that there had been no election of officers or meeting of the stockholders of the company since 1857, and since that year no calls on subscriptions to stock had been made, and no efforts made to collect previous calls, and it had since then given up all attempts to build the road and abandon its franchises ; and in the

month of July, 1869, M. L. Bell, R. V. McCracken, and Samuel Butler, the last elected president, secretary and treasurer of the company, by an instrument of writing, in their respective capacities, so far as they might or could, sold and transferred to the Little Rock, Pine Bluff, and New Orleans R. R. Co., whatever interest the company had in the work done and in the line of road, and turned over and delivered to it, all its books, records, and papers; and said Little Rock, Pine Bluff, and New Orleans R. R. Co. took possession of such part of the abandoned line and work as answered its purpose, and proceeded to build and put in operation, as a part of its main line from Little Rock to the south boundary of the state, the road from Pine Bluff to Eunice on the Mississippi river, a distance of seventy miles, which ran, a part of the way, on the plaintiff's abandoned line.

That the Little Rock, Pine Bluff, and New Orleans R. R. Co. afterwards became consolidated with the Mississippi, Ouachita and Red River R. R. Co., under the name of the Texas, Mississippi River and Northwestern R. R. Co., and the last mentioned company thereafter operated the road until the sale under the decree.

That the sale under the decree was confirmed by the court, and the purchasers thereat and their associates afterwards on the eighteenth day of December, 1875, organized themselves as a corporation under the provisions of the act of December 9, 1874, by the name of the Little Rock, Mississippi River and Texas Ry., which became entitled to and vested with all the corporate rights and franchises that had belonged to the Little Rock, Pine Bluff and New Orleans R. R. Co., or was derived from it by the Texas, Mississippi River and Northwestern R. R. Co., under the consolidation.

That after the organization of the defendant corporation, it was found impracticable to maintain and operate part of the road from Pine Bluff to Eunice, and the defendant, as permitted and authorized by the act of March 3, 1877, entitled "an act authorizing the change or abandonment of location by railroad corporations," abandoned about fifty miles of its line as then constructed, or from Varner's station, twenty-five miles southeasterly from Pine Bluff, to Eunice, and at great expense built about fifty miles of new road on another line—not running near Napoleon—from Varner's station to Arkansas City on the Mississippi river below Eunice.

That by an act of the general assembly, approved March 15, 1879, entitled "an act to donate certain lands of the state to the Little Rock, Mississippi River and Texas Ry.," the state granted to it certain lands in aid of the construction of its road, and as one of the conditions of the grant required it to begin work on the line between Little Rock and Pine Bluff within twelve months from the passage of the act and to finish the same within two years; and that it had surveyed and located the line between the two places and bought the necessary rails and fastenings, and con-

tracted for the grading and ties therefor, and before the expiration of twelve months after the passage of the act, began, and was then proceeding with the work of construction as rapidly as circumstances permitted.

That the possession taken by the Little Rock, Pine Bluff and New Orleans R. R. Co. of the part of the plaintiff's abandoned line, was open and notorious, and the same, except so much as the defendant had voluntarily abandoned, had been ever since, until the commencement of the suit, held peaceably and adversely, successively, by the Little Rock, Pine Bluff and New Orleans R. R. Co., the Texas, Mississippi River and Northwestern R. R. Co. and the said defendant; and that the plaintiff was estopped from asserting against the said defendant a right of franchise to build a railroad between Little Rock and Pine Bluff.

And it further alleged that there was still no regular or valid organization of the plaintiff company; but that certain of the former stockholders, and other persons, falsely claiming to be stockholders, in order to annoy and harass the defendant and embarrass it in the construction of the road, and thereby extort money from it, had recently combined together, and pretended to elect a board of directors and to appoint a president and other officers, and to reorganize the company.

And that having since 1857 abandoned all efforts to build its road, and since then had no organization as a corporation at the adoption of the present constitution, it was by section 1, of Article XII, thereof, deprived of its charter and franchises.

It denied that the Little Rock, Pine Bluff and New Orleans R. R. Co. failed to file in the office of the secretary of state, within two years after the filing of its articles of association, a preliminary survey of its road, or an affidavit of three of its directors that five per cent of the stock subscribed had actually and in good faith been paid to the directors; and each and all other matters whereby it was alleged in the complaint that it forfeited or was deprived of its franchises, and ceased to be a corporation. And also denied that the organization of the defendant was not within one year after the sale under the decree, or that the certificate thereof was not filed within six months after the organization took place.

It also filed a cross-complaint, which, in addition to the averments in the answer we have already stated, alleged, that the plaintiff, if still a corporation, not having surveyed and located its road between Little Rock and Pine Bluff, it, the defendant, has now the sole and exclusive right under the provisions of the act of July 23, 1868, to build a railroad between said places within the distance of ten miles of its line; that it was building one of the public highways of the State, to aid in the construction of which the State had granted to it many thousand acres of land, upon the

condition that the road between Little Rock and Pine Bluff should be completed on or before the fifteenth day of March, 1881; that if it should suspend work upon it, the public would be subjected to great inconvenience and loss, and it, the defendant, would be liable to a multiplicity of suits for damages, and would otherwise suffer irreparable loss and injury; that the plaintiff was insolvent; and if damages were recovered against it, they could not be collected, and that the filing of the complaint cast a cloud upon its right and authority to build the road and greatly impaired the value of its securities.

And it prayed that the plaintiff should be enjoined from prosecuting any suit against it calling in question its right to build and operate the road between Little Rock and Pine Bluff or for maintaining and operating the road between Pine Bluff and Arkansas City, and from itself building a road between Little Rock and Pine Bluff within ten miles of the defendant's road.

The plaintiff answered the cross-complaint. It denied as in its complaint, that the Little Rock, Pine Bluff and New Orleans R. R. Co. ever became or was a corporation, and also denied that the defendant ever became or was a corporation, alleging that the purchasers at the sale and their associates were not citizens or residents of the State, but that to simulate a compliance with the act of December 9, 1874, which requires a majority of the directors of the corporation formed under it to be citizens and residents of the State, one share of stock was by them transferred without consideration and without their knowledge, respectively to Dudley E. Jones, Sol. F. Clark, S. L. Griffith and C. F. Penzel, citizens and residents of the State, to qualify them to become directors; and so, though not citizens and residents themselves of the State, in fraud of the law, to organize themselves as a corporation.

The other defendants made no defence to the action.

The court upon the hearing dismissed the complaint for want of equity, and rendered a decree in favor of the defendant company upon the cross-complaint, enjoining the plaintiff from interfering with or obstructing it in the construction or in the operating of its road, and from bringing any suit for the possession thereof; but did not enjoin it from building a road of its own under its charter.

The plaintiff appealed.

The act of January 12, 1853, to incorporate the Little Rock and Napoleon R. R. Co., is a public act of which we will take notice, and by it the plaintiff ipso facto et eo instanti was created a corporation, as held in *Hammett v. Little Rock and Napoleon R. R. Co.*, 20 Ark. 204, the act declaring that "regular organization of the company shall be presumed and considered as proved in all courts of justice." And it appears by the pleadings and the evidence, that it had, long before the adoption of the present constitution, commenced in good faith the construction of its road. Sec-

tion 1 of Article XII, of the constitution, by which the charters of corporations, of which there had been no bona fide organization, and which had not in good faith commenced business, were revoked, has, therefore, no application to it.

The appellant does not claim that its charter has conferred on it an exclusive right to build a railroad between Little Rock and Pine Bluff, or that the State might not have granted a like franchise to its own to another company; but that until such grant is made, it has the sole right, and the building of another and competing road, by an unincorporated company to which the State has not granted the privilege, by which its gains and profits will be continually affected and impaired, will so interfere with the appellant's use and enjoyment of its property as to be a nuisance.

As an abstract proposition, this, we think, may not be questioned, but we do not deem it necessary to inquire whether the appellee company be a corporation, or have such a franchise, or not; nor, therefore, whether the acts of July 23, 1868, and of December 9, 1874, under which the appellee company claims corporate powers and franchises, were constitutionally passed, and are valid and subsisting laws.

The appellant appears to have done no work on its road since 1857, and since 1861 (if not since 1857, as to which the proof is not clear,) there had been no election of officers or meeting of the stockholders, and from that time until the reorganization of the company, in December, 1879, just before the commencement of the suit, it had no organization, and it seems from the evidence, long before the attempted transfer of the line and work done on it by its former president, secretary and treasurer, in 1869, to the Little Rock, Pine Bluff and New Orleans R. R. Co., the stockholders had abandoned all expectation or purpose of building the road. Many of them had become insolvent and gone into bankruptcy, and many of them were dead, and no probability existed of the company ever building the road, and some of the stockholders expressly consented to and approved the action of the former officers in transferring, or attempting to transfer, the line and road-bed to said company, and in turning over to it the books, records and papers, and none made any objection thereto, or to said company building its road from Pine Bluff to Eunice, upon the line.

And, as shown by the pleadings and evidence, the appellee company had been, when the suit was commenced, since the eighteenth day of December, 1875, claiming to be and acting as a corporation, and had been recognized as such by the act of March 15, 1879; and been in the possession of and operating the road built on said line by said company from Pine Bluff to Eunice, except that portion between Varner's station and Eunice, which it had subse-

quently abandoned, and had in the meantime built some fifty miles of new road from Varner's station to Arkansas City.

And from the time the Little Rock, Pine Bluff and New Orleans R. R. Co. took possession of the line, in 1869, until the reorganization of the appellant company, in December, 1879, it stood by, and saw, without remonstrance, or objection by it, or any of its stockholders, the Little Rock, Pine Bluff and New Orleans R. R. Co. build the road from Pine Bluff to Eunice, and the appellee company, after it became the owner of it by the purchase at the foreclosure sale, at great cost and expense, build fifty miles of new road from Varner's station to Arkansas City; and not until the road from Pine Bluff to the Mississippi river had been built and in operation, and the appellee company was about to build from Pine Bluff to Little Rock, did the appellant assert a claim to or indicate an intention to build that part of the line.

There is no satisfactory proof that the line between Little Rock and Pine Bluff was ever established.

It's evident that the building of that part of the road from Pine Bluff to the Mississippi river has greatly increased the necessity for, and importance of, that between Little Rock and Pine Bluff.

We are clearly of the opinion, whether the appellee company has a grant from the State of the franchise to build the road or not, the appellant is estopped from questioning its authority.

Gross injustice would be done the appellee company if it should now be enjoined from the completion of its road, and if an injury results to the appellant, it has been induced by its own conduct. "A corporation," says Justice CAMPBELL, in the case of *Zabriskie v. Cleveland, Columbus and Cincinnati Ry.*, 23 How. 381, "quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced."

And Sir SAMUEL ROMILLY remarked, in the case of the *Rochdale Canal Company v. King*, 16 Beav. 630, that "if one stand by and encourage another, though but passively, to lay out money, under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the court will not permit any subsequent interference with it by him who formerly promoted and encouraged those acts of which he now either complains or seeks to obtain the advantage."

After for so many years passively encouraging other companies to expend their money and means in the construction of the road, it is too late now for the appellant to claim that it only has a franchise build it. *Hitchen v. The St. Louis, Kansas City and Northern*

no existing right, as the receivers held for all interested parties, the orators in the cross-bill, as well as the bondholders; that the court, having taken jurisdiction, would retain the cause for final determination of all questions arising on the claims of any interested party; and that the receivers should be made chargeable as holding the chattel property subject to such creditors' rights.

Each mortgage was upon trust, among other things, that until default, and while the mortgagors remained in possession and operated the roads and took the income, as aforesaid, they should apply the income "to the payment of the current expenses of the road . . . or dispose of the same for the lawful uses" of the mortgagors. The net earnings were in part expended in making new road to the enhancement of the value of the mortgaged property; and the chattels of the several roads were lessened in value by use in the making of income. *Held*, that, as by the terms of the mortgages the mortgagors were bound to pay the current expenses from the current earnings, the mortgagees took their security burdened with that trust; that the mortgagees, out of possession, had no right to earnings superior to the mortgagors'; and that the receivers should be ordered to apply the net income first to the discharge of debts that were for such expenses.

It was *held*, that the protection afforded to creditors by the statute extended to creditors who were engaged in manual labor in making repairs or in operating the roads, or who had furnished materials to be used therein, as iron, ties, lumber, wood, coal, oil, etc., even although such creditors had taken promissory notes for their claims, as it was not to be presumed from a change in the form of indebtedness that it was intended to waive the priority of lien; but that such protection did not extend to claims for services of directors, superintendents, civil engineers, attorneys, cashiers, paymasters, or heads of departments, nor to claims for rent of offices occupied by them, nor to claims for telegraphing ordered by them, nor to claims for the printing of tickets, bill-heads, posters, time-tables, etc., and the materials used therein.

APPEAL from the Court of Chancery. The bill disclosed the following case:

On May 1, 1871, the Lamoille Valley R. R. Co., the Montpelier and St. Johnsbury R. R. Co., and the Essex County R. R. Co., which had been duly chartered by the Legislature, and had entered into a joint arrangement for building and equipping their several roads as one continuous line from the Connecticut River to Swanton, on Lake Champlain, to be known as the Vermont Division of the Portland and Ogdensburg R. R., and for operating the same as such a line, in order to raise money to construct and equip said road, executed to the orator Poland and Abraham T. Lowe a mortgage deed of their several railroads, including all their real and personal property, together with their tolls and income, and all their corporate rights and franchises, in trust, to secure the payment of their joint bonds to the amount of \$2,300,000, with six per cent. semi-annual interest coupons thereto attached. That deed was duly accepted by the trustees therein named, the bonds thereby to be secured were duly executed and sold or pledged, and the money thereby obtained was afterwards all used in building and equipping said several roads. On April 1, 1874, said companies executed an-

other like deed of the same property to the same parties, in trust, to secure the payment of the joint bonds of said companies, denominated second-mortgage bonds, to the amount of \$1,770,000. The bonds thereby to be secured were duly executed, but only one hundred and twenty-five of them, amounting to \$125,000, were ever issued, and they were pledged to the Portland and Ogdensburg R. R. Co., as security for an indorsement of the notes of said company for \$50,000, which were never paid. On each of the bonds so pledged were stamped the words, "This bond and all bonds secured by the joint mortgage dated April 1, 1874, are subject to the prior lien of the joint preference bonds to the amount of five hundred thousand dollars, secured by a joint mortgage dated July 18, 1876, and this bond is sold subject to the prior lien of said preference bonds on the roads and their earnings." On January 1, 1875, said companies, jointly with the Lamoille Valley Junction R. R. Co., and the Portland and Ogdensburg R. R. Co., executed a like deed of their several railroads and the franchises and property of each to Israel Washburn, Jr., Philip H. Brown, and the orator, in trust, to secure the payment of the joint bonds of all of said companies to the amount of \$9,500,000, of which bonds to the amount of about \$80,000 only were executed and sold or pledged. On July 18, 1876, the first-named three companies, having expended the proceeds of the first-mortgage bonds, being unable to negotiate the second-mortgage or third-mortgage bonds, and needing \$500,000 to complete and equip their roads, executed another like deed of the property conveyed by the said first-mentioned deed to the orator, in trust, to secure the payment of their joint bonds to the amount of \$500,000. It was thereby provided that no bonds should be issued thereunder until the holders of bonds issued under the first mortgage to the amount of \$1,800,000 had signed an agreement in writing, as follows:

"We whose names are hereto subscribed, holders of bonds of the numbers and amounts set against our respective names, issued under, and secured by, the first mortgage of the Essex County Railroad Company of the Montpelier and St. Johnsbury Railroad Company, and of the Lamoille Valley Railroad Company, hereby severally agree that for the purpose of completing and equipping the line of the said several roads to Lake Champlain, in Swanton, Vt., under existing contracts or otherwise, and of paying the interest on the debts, for the payment of which a portion of such bonds are pledged, the said several railroad companies may issue bonds to be denominated preference bonds, in character like the first mortgage bonds, to the amount of five hundred thousand dollars, secured by a joint mortgage of the several railroads and their equipment like unto the first mortgage thereof, which shall constitute and be a lien on the same, prior to the bonds held by us severally, the mortgage and bonds to be made to Hon. Luke P. Poland as trustee; said

no existing right, as the receivers held for all interested parties, the orators in the cross-bill, as well as the bondholders; that the court, having taken jurisdiction, would retain the cause for final determination of all questions arising on the claims of any interested party; and that the receivers should be made chargeable as holding the chattel property subject to such creditors' rights.

Each mortgage was upon trust, among other things, that until default, and while the mortgagors remained in possession and operated the roads and took the income, as aforesaid, they should apply the income "to the payment of the current expenses of the road . . . or dispose of the same for the lawful uses" of the mortgagors. The net earnings were in part expended in making new road to the enhancement of the value of the mortgaged property; and the chattels of the several roads were lessened in value by use in the making of income. *Held*, that, as by the terms of the mortgages the mortgagors were bound to pay the current expenses from the current earnings, the mortgagees took their security burdened with that trust; that the mortgagees, out of possession, had no right to earnings superior to the mortgagors'; and that the receivers should be ordered to apply the net income first to the discharge of debts that were for such expenses.

It was *held*, that the protection afforded to creditors by the statute extended to creditors who were engaged in manual labor in making repairs or in operating the roads, or who had furnished materials to be used therein, as iron, ties, lumber, wood, coal, oil, etc., even although such creditors had taken promissory notes for their claims, as it was not to be presumed from a change in the form of indebtedness that it was intended to waive the priority of lien; but that such protection did not extend to claims for services of directors, superintendents, civil engineers, attorneys, cashiers, paymasters, or heads of departments, nor to claims for rent of offices occupied by them, nor to claims for telegraphing ordered by them, nor to claims for the printing of tickets, bill-heads, posters, time-tables, etc., and the materials used therein.

APPEAL from the Court of Chancery. The bill disclosed the following case:

On May 1, 1871, the Lamoille Valley R. R. Co., the Montpelier and St. Johnsbury R. R. Co., and the Essex County R. R. Co., which had been duly chartered by the Legislature, and had entered into a joint arrangement for building and equipping their several roads as one continuous line from the Connecticut River to Swanton, on Lake Champlain, to be known as the Vermont Division of the Portland and Ogdensburg R. R., and for operating the same as such a line, in order to raise money to construct and equip said road, executed to the orator Poland and Abraham T. Lowe a mortgage deed of their several railroads, including all their real and personal property, together with their tolls and income, and all their corporate rights and franchises, in trust, to secure the payment of their joint bonds to the amount of \$2,300,000, with six per cent. semi-annual interest coupons thereto attached. That deed was duly accepted by the trustees therein named, the bonds thereby to be secured were duly executed and sold or pledged, and the money thereby obtained was afterwards all used in building and equipping said several roads. On April 1, 1874, said companies executed an-

other like deed of the same property to the same parties, in trust, to secure the payment of the joint bonds of said companies, denominated second-mortgage bonds, to the amount of \$1,770,000. The bonds thereby to be secured were duly executed, but only one hundred and twenty-five of them, amounting to \$125,000, were ever issued, and they were pledged to the Portland and Ogdensburg R. R. Co., as security for an indorsement of the notes of said company for \$50,000, which were never paid. On each of the bonds so pledged were stamped the words, "This bond and all bonds secured by the joint mortgage dated April 1, 1874, are subject to the prior lien of the joint preference bonds to the amount of five hundred thousand dollars, secured by a joint mortgage dated July 18, 1876, and this bond is sold subject to the prior lien of said preference bonds on the roads and their earnings." On January 1, 1875, said companies, jointly with the Lamoille Valley Junction R. R. Co., and the Portland and Ogdensburg R. R. Co., executed a like deed of their several railroads and the franchises and property of each to Israel Washburn, Jr., Philip H. Brown, and the orator, in trust, to secure the payment of the joint bonds of all of said companies to the amount of \$9,500,000, of which bonds to the amount of about \$80,000 only were executed and sold or pledged. On July 18, 1876, the first-named three companies, having expended the proceeds of the first-mortgage bonds, being unable to negotiate the second-mortgage or third-mortgage bonds, and needing \$500,000 to complete and equip their roads, executed another like deed of the property conveyed by the said first-mentioned deed to the orator, in trust, to secure the payment of their joint bonds to the amount of \$500,000. It was thereby provided that no bonds should be issued thereunder until the holders of bonds issued under the first mortgage to the amount of \$1,800,000 had signed an agreement in writing, as follows:

"We whose names are hereto subscribed, holders of bonds of the numbers and amounts set against our respective names, issued under, and secured by, the first mortgage of the Essex County Railroad Company of the Montpelier and St. Johnsbury Railroad Company, and of the Lamoille Valley Railroad Company, hereby severally agree that for the purpose of completing and equipping the line of the said several roads to Lake Champlain, in Swanton, Vt., under existing contracts or otherwise, and of paying the interest on the debts, for the payment of which a portion of such bonds are pledged, the said several railroad companies may issue bonds to be denominated preference bonds, in character like the first mortgage bonds, to the amount of five hundred thousand dollars, secured by a joint mortgage of the several railroads and their equipment like unto the first mortgage thereof, which shall constitute and be a lien on the same, prior to the bonds held by us severally, the mortgage and bonds to be made to Hon. Luke P. Poland as trustee; said

preference bonds to be payable, principal and interest, in gold, in twenty years, and at the option of said companies after five years from the 1st day of May, A.D. 1876, and to bear interest at the rate of six per cent. per annum semi-annually. This agreement and consent is not to be binding until the holders of the first mortgage bonds to the amount of eighteen hundred thousand dollars shall execute the same, nor until the trustee in the preference mortgage, being one of the trustees of the first mortgage, shall consent hereto in writing; said preference bonds are not to be pledged or sold for less than their par value without the consent of said trustee, and none of said bonds are to be issued by said trustee until he is fully satisfied that the said companies have made such arrangements and contracts, that the issue of said bonds will accomplish the completion of the line to Lake Champlain, and that said companies will pay the interest on the debts for the payment of which the first mortgage bonds are pledged, for at least two years from the date of the preference bonds."

That agreement was signed by holders of the first-mortgage bonds to the amount of about \$1,870,000, and the orator signed a certificate, stating his satisfaction of the matter in the agreement referred to, and his assent as one of the trustees under the first mortgage, and as sole trustee under the proposed mortgage, to the terms of the agreement. The agreement so signed and said certificate were incorporated in the preference mortgage; and a list of such signers, etc., was attached to the mortgage and recorded therein in all offices where the mortgage was required by law to be recorded. The bonds provided for by that mortgage were duly executed, and nearly all of them were issued to pay for the construction of said roads and the material used therein, the remainder being retained by the trustee to pay the expenses incident to the trust. The interest that fell due on the first-mortgage and other bonds after May 1, 1876, was never paid. Lowe resigned his trust, and Albert B. Jewett was appointed in his place, and duly accepted the trust. The bill alleged that the orator had been called on by a large portion of the holders of the preference bonds to begin legal proceedings to enforce payment of interest on their bonds, or to foreclose their mortgage, and that the orator brought the bill in their behalf; that E. & T. Fairbanks & Co. were holders of first-mortgage bonds to a considerable amount, who had signed the preference agreement; that the First National Bank of St. Johnsbury and James R. Nichols were holders of such bonds, who had not signed; that Bradley Barlow was the holder of some of such of those bonds as were pledged for the payment of loans, and that those parties, with said Jewett, would fairly represent other bondholders in the same situation; that Lowe and the Portland and Ogdensburg Railroad Company would fairly represent the holders of second-mortgage bonds; that Israel Washburn, Jr.,

and Philip H. Brown, two of the trustees under the third or consolidation mortgage, with the Portland and Ogdensburg Railroad Company and the First National Bank of St. Johnsbury, holder of outstanding bonds under that mortgage, would fully represent all interests under said mortgage; that the orator was informed and believed that said companies in running and operating their roads jointly became and were indebted for services and supplies furnished for such purpose to various persons who claimed to have some kind of equitable lien on the roads, or the personal property thereon, or the earnings and income thereof, and that George E. Howe, of St. Johnsbury, Vt., and Capen, Sprague & Co., of Boston, Massachusetts, claimed to be creditors of that class; that the roads of the company were very incomplete, and must soon have a very considerable expenditure of money thereon, to run with safety; that the companies were largely indebted to many persons who were not secured, and that, if the roads remained in the hands of the companies, all the earnings thereof and all the personal property would be taken for the payment of such debts, and diverted from the payment of the interest on the bonds; that the orator as trustee under said preference mortgage had wholly declined to take possession of said roads and run them as trustee, as had the trustee under the first mortgage, and that they regarded it "as simply impossible for them so to do without the greatest peril of pecuniary loss and ruin to themselves."

The bill prayed that the above-named trustees and bondholders be made parties to represent their own and other like claims; that an account be taken of the bonds outstanding under the preference mortgage and of the interest due thereon, and, so far as necessary, of the other outstanding bonds, and of those who signed and those who did not sign the preference agreement, that all questions of priority might be settled and a proper decree of foreclosure made on the preference "mortgage; that some suitable person or persons" be appointed as receivers to take possession of said roads and property and operate the same "under the order and protection of the court, until a final decree should be made in the premises;" and for general relief.

The mortgages were filed with the bill as a part thereof. The first mortgage was between the three first-mentioned companies as parties of the first, second and third parts respectively, and the orator and said Lowe of the fourth part. It was stipulated in the habendum thereof that the conveyance thereby made was made and accepted upon trust, and subject to limitations and conditions, first, to secure the payment of the principal and interest on the joint bonds thereby secured, ratably and without preference, and further, so far as material, as follows:

"*Third.* Upon trust until default shall have been made by the parties of the first, second and third parts in payment of the prin-

principal or interest of said bonds, or some of them, or until default shall have been made in respect to something herein agreed or required to be done by them, to suffer and permit the said parties of the first, second and third parts to possess, use, occupy, manage, and operate the said railroad property, franchises, and appurtenances, and to renew, replace, and repair the said property and every part thereof, and take, receive, and use the tolls, rents, issues, incomes, and profits thereof, and apply the same to the payment of the current expenses of the roads, and to the purchase of necessary machinery and equipment, or dispose of the same for the lawful uses of the said parties of the first, second, and third parts, in any manner not inconsistent with this indenture. And the boards of directors of said several companies may likewise distribute and pay any net annual incomes to stockholders, after providing for the interest on any and all bonds which said companies may owe.

"*Fourth.* Upon trust that in case the said parties of the first, second, and third parts shall fail, neglect, omit, or refuse to pay the principal of, or the interest upon, the said bonds or any part thereof, as the same shall respectively become due and payable, and such failure, neglect, omission, or refusal shall continue for the period of four months after the payment thereof shall have been demanded in writing, then the said parties of the fourth part, or either of them, upon the refusal of the other, or their successors in said trust, may, by themselves or their attorneys, agents, or servants in that behalf, upon the written request of the holders of a majority in amount of such bonds then outstanding in respect whereof there shall have been any such failure, neglect, omission, or refusal, enter into and upon, and take possession of, all, or, in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroads and receive the income, receipts, and profits thereof, and out of the same pay: 1st. The expenses of running and operating the same, including therein such reasonable compensations as they or he may allow to the several persons employed or engaged in running and superintendence of the same, and all taxes, assessments, charges, or liens having priority or preference to the lien of these presents upon the said premises, or any part thereof, and a reasonable compensation to the parties of the fourth part, or their successors, or such of them as shall act in the premises, for their or his care, diligence, and responsibility in the premises, and for the services of such attorneys and counsel as may have been by him or them employed, and also the expenses of keeping the said roads and appurtenances, the locomotives, and rolling stock thereof in good and sufficient repair, etc."

Under the sixth trust therein specified, the trustees were empowered, after a default of six months, and on request of the hold-

ers of three fourths in amount of the outstanding bonds, to take possession of the mortgaged premises and sell the same at auction. The other mortgages were upon like trusts.

In December following, a cross-bill was filed by said Poland and Jewett in behalf of the holders of bonds issued under the first mortgage, which made substantially the same allegations that were made in the original bill, the only difference therein being in the additional designation of the Mercantile Trust Company of New York, assenting holders of bonds issued under the first mortgage, of the National Bank of the Republic, and Isaac C. Price of Philadelphia, non-assenting holders of like bonds, and of the Portland Rolling Mills and George R. Davis of Portland, holders of preference bonds to a large amount, as proper representative parties; and the allegation of the bringing of the original bill. The cross-bill prayed that those persons and corporations, with those named in the original bill, might be made parties, that an account might be taken of the bonds outstanding under the first mortgage and of the interest due thereon, and that a proper decree of foreclosure be made on the first mortgage, and further the same as the original bill.

The defendant Nichols answered, alleging that he never assented to the preference mortgage; insisting that the bill could not be maintained against him to impair his security under the first mortgage; insisting that if a decree of foreclosure were made, the orator should be first ordered to pay the defendant and other non-assenting holders of first mortgage bonds the amount of their bonds in full, with interest; that if the preference mortgage had any validity against the holders of first-mortgage bonds, which the defendant did not admit, it operated only as an assignment to the holders of preference-mortgage bonds of whatever interest the holders of bonds issued under the first mortgage had thereunder; insisting that the proper remedy of the holders of bonds issued under the preference mortgage was by foreclosure of the first mortgage for the joint benefit of themselves and the non-assenting holders of first-mortgage bonds; and insisting that there could be no foreclosure on the preference mortgage, except subject to the rights of all holders of the first-mortgage bonds.

The defendants Washburn and Brown of the First National Bank of St. Johnsbury answered, admitting the execution of the several mortgages in the bill mentioned, and the issue of certain bonds thereunder; alleging that certain of the bonds issued under the third or consolidation mortgage had been sold or pledged, and were still outstanding and unpaid, that the First National Bank of St. Albans held some of them, and, as the defendants were informed and believed, that George R. Davis of Portland, and A. C. Mitchell of Bellows Falls, and others, held still others of them; and insisting that, as no agreement had been made by or in behalf of such hold-

ers, that the preference mortgage should take precedence of their mortgage, and as without such agreement the preference mortgage could not become a lien prior to said third mortgage, and as the bonds under the second mortgage were so issued as to give place to the bond issued under the preference mortgage, and as the first mortgage by reason of the alleged agreement and certificate also became subordinate to the preference mortgage, and as the first and second mortgages were thus both removed from their position of priority, the consolidation mortgage became and was a first lien on the property therein described, and that a decree should be entered accordingly.

The said Howe, and Edward N. Capen and Charles Sprague, partners in trade under the name of Capen, Sprague & Co., filed a cross-bill admitting the incorporation of said three first-mentioned companies, their association for operating their respective roads, the execution of the four several mortgages, the issuance of bonds thereunder, and the validity of the several mortgages as between the parties thereto and as against said companies, and alleging the filing of the bill and cross-bill already stated. The cross-bill further alleged that on October 18, 1877, on the filing of the bill, without the previous knowledge or consent of the orators in this cross-bill, the orator Poland procured the court to appoint Albert B. Jewett and Albert W. Hastings receivers of said roads, and that they, as such, took and ever after held possession of said roads and all the personal property belonging thereto; that, after the completion of the various portions of said roads, the actual operation thereof by the regular running of trains for the transportation of freight and passengers, was necessary for the performance of the duties of said companies to the State and the public, as well as for the preservation of the property and rights of said companies and the security of the holders of the several classes of bonds; that for the actual operation of said roads it was necessary for the officers thereof to keep said roads and the equipments thereof in repair, and to run the same, to purchase wood, oil, and other materials, and to employ conductors, station agents, and other laborers and servants; that long before receivers were appointed as aforesaid, said companies were insolvent and in default in payment for materials, services, etc., furnished, etc., for such purposes; that before the appointment of receivers as aforesaid, said companies became indebted to the orators Capen and Sprague, in the sum of about \$1,300, for oil by them furnished for said companies for current and necessary use in the running and operating of said roads, that they also became indebted to the orator Howe in the sum of about \$1,600 for services by him performed as a mechanic for said companies in the necessary running of said roads and repairing of the equipment thereof, and that they also became indebted to several other persons for materials furnished and services performed for

like purposes; that said debts were made in the expectation and understanding on the part of the creditors, that all the income and personal property of said companies were held for the payment of said debts; that the orators in this cross-bill had a proper lien upon, and right of attachment against, all the income and personal property of said companies for the payment of said debts, superior in equity to the claim of any of the holders of said bonds; that the orators Howe, etc., had applied to said companies and to said receivers for payment of their said debts, which was refused, but that they would have obtained payment from the income, etc., of said roads had it not been for the appointment of said receivers, who had ever since their appointment continued to operate said roads and to take to themselves all the income, etc., thereof, so that it became and remained impossible for said orators so to secure payment of any portion of their debts. Said cross-bill prayed that the several persons and corporations named as proper parties in precedent pleadings might be made defendants thereto; that an account be taken of the sums due when said receivers were appointed, from said companies to the orators Howe, etc., and to other like creditors who might contribute to the expenses of these proceedings; that said receivers be ordered to pay said debts and forbidden to pay any portion of said income, etc., to said bondholders until said debts should be paid; that said debts be decreed to be a first lien on all income, furniture, cars, engines, and rolling stock; that a decree be entered requiring said bondholders to pay said debts before having a decree of foreclosure in their favor; that the original bill and the first-mentioned cross-bill be dismissed with costs to said orators Howe, etc., unless said bondholders paid said debts within a time limited; and for general relief.

The cross-bill of said Howe and others was answered by said Poland, who alleged that he was informed and believed that there were some debts of the kind thereby alleged; that they were not a lien on said railroads or the personal property thereon or the income thereof; that the only right the creditors on account of such debts ever had other or different from those of general unsecured creditors of said companies, was the right to sue said companies and attach their personal property while the same was in their possession, and that, not having availed themselves of such right, they stood on the same footing with other unsecured creditors; and that if the creditors on account of such debts had any equitable right or lien, it was only against the personal property of said companies, and not against their roads or the income thereof.

It was also answered by Isaac C. Price and by Joseph Haight, another holder of bonds issued under the first mortgage. They thereby alleged that, if there were any such debts as in said cross-bill alleged, which they did not admit, but concerning which they left the orators therein to their proof, and if any right of attach-

ment existed in their favor, the orators then had no lien on said roads or property or income, and especially none that could have precedence of the security afforded by said first mortgage for the payment of bonds purchased without notice, as said Price and Haight alleged this to have been; that the only right said creditors had was the right to attach the personal property of said companies while it was still in possession of the companies, and that not having availed themselves of that right, they stood on the same footing with other unsecured creditors; that if creditors had such claims, they could not be enforced by cross-bill; that the receivership was instituted without notice to the answering defendants, without adequate necessity, without warrant of law, and had been continued greatly to their detriment; and that the existence thereof gave the orators in said cross-bill no right to such relief as they claimed, nor any right to seek the same by way of cross-bill.

The National Bank of the Republic, and another having like interests, demurred, for that said Howe and others, not being parties, were not entitled to maintain a cross-bill, that if they could maintain one for themselves, they could not maintain it for the benefit of others whose interests were not joint with theirs, that the matters alleged and the relief prayed for in the cross-bill did not grow out of the original bill, or the relief there sought, and that the cross-bill contained no matter entitling the orators therein to maintain the same or any cross-bill of like nature. They also moved to dismiss, for like reasons.

It was stipulated that the cross-bill of Howe and others should be treated as an answer to the original bill and the first-named cross-bill.

A master was appointed to take an account of the bonds outstanding under the several mortgages, to see how many of the holders of the first-mortgage bonds assented to the issuance of bonds under the preference mortgage, and to take an account of the debts due to said Capen, Sprague & Co., said Howe, and others whose debts were like theirs. The master found that default was made in the payment of the interest on the first-mortgage bonds in May, 1876; that all of those bonds were outstanding and would become due on May 1, 1891; that the interest due thereon on November 1, 1878, would be \$534,902.50; that the orator Poland issued preference bonds to the amount of \$410,000, and still retained the remaining bonds of that issue to the amount of \$90,000; that holders of first-mortgage bonds to the amount of about \$1,870,000 assented to the issuing of bonds under the preference mortgage, as alleged in the original bill and the first cross-bill, and upon the terms therein stated; and that bonds issued under the consolidation mortgage to the amount of \$63,000 were still outstanding and unpaid, together with some accrued interest thereon. He also found that receivers were, appointed, as alleged in the cross-bill of Howe

and others, that the value of the personal property of the Lamoille Valley R. R. Co. at the time they were appointed was about \$92,000, that after they were appointed a considerable portion of the earnings of the road had been expended on the road and on the purchase of new rolling stock, and that "from the time the road commenced running, in 1872," the earnings were sufficient to operate the road, that is, to pay for service, for the expenses of running, and for repairs to keep the road in as good condition as it was in when it began to run. Numerous claims for services performed, materials furnished, etc., were presented before the master for proof under the cross-bill of Howe, etc., and the master made a list of such thereof as were conceded to be correct. Among the latter were a claim for \$1,104.26 for services of cashier and paymaster, and several claims for sums due on promissory notes that had been taken in payment of debts incurred for services performed and material furnished. There were also several claims presented to which objection was made for that they were incurred in constructing the roads, or were for other reason not such as should be included among the claims provable under the cross-bill. Among them were a claim for \$2,241.32 for telegraphing done in the usual and ordinary business of the railroad—the greater part of it in regulating the running of trains; a claim for printing and materials for tickets, time tables, freight receipts, blanks and office stationery, advertisements, placards, etc.; claims by the members of an executive committee of the associated roads, composed of members of the several boards of directors, for services such as are usually performed by boards of directors, and in part for a part of such as are usually performed by superintendents, and for expenses incurred therein; a claim by the president of the Lamoille Valley R. R. Co. for services, etc., as president and director, and for money that he had paid, or become liable to pay, for the company; a claim for services and expenses of chief engineer of the same road; and a claim for the services of an assistant civil engineer. It appeared from the master's report that the line of road composed of the three roads was in process of construction and extension the greater part of the time from before the first mortgage was issued down to the time of the appointment of receivers.

The cause was heard before POWERS, Chancellor, at the June Term, 1879, Caledonia County, when a pro forma decree was entered on the cross-bill of the trustees under the first mortgage in favor of the trustees, for a foreclosure against said companies and against the trustees and bondholders under the second and the consolidation mortgages, in default of payment of the first-mortgage bonds within a time therein limited; and, in case such decree should become absolute, for a foreclosure in favor of the trustee under the preference mortgage against said companies and against such holders of first-mortgage bonds as assented to the issuing of

bonds under the preference mortgage, in default of payment of the bonds issued under the preference mortgage within a time therein limited. The decree further ordered that in case of non-payment of such sums, or any of them, said trustee should be subrogated to and hold all right and interest of the assenting bondholders in the first mortgage, or the property covered by the decree thereon; and that the cross-bill of Howe and others be dismissed.

The trustees under the consolidation mortgage, the orators in the cross-bill of Howe and others, and J. R. Nichols appealed.

L. P. Poland, for the orator.

The non-assenting first-mortgage bondholders are not entitled to the first mortgage, clear, and to be redeemed in full. The question is raised faintly, if at all, by the answer of Nichols.

The exchange of places between the preference bonds and a portion of the first mortgage bonds does not affect the consolidation mortgage.

The lien claims cannot be made a charge on the roads or their equipment. The property was all covered by all the mortgages; and the mortgages were good as against creditors, as there was no change of possession. The statute gave no lien, but a right to attach while the property was in possession of the companies. *Douglass v. Cline*, 12 Bush. 608, which is relied on, is not law, and, if it were, it has no application here. Certain remarks of Waite, C. J., in *Fosdick v. Schall*, 9 Otto, 235, are also relied on, but the decision is the other way.

C. W. Willard and Thomas H. Russell, for Nichols.

In the absence of special statutes railroad mortgages are subject to the general law of mortgages. *Dunham v. Railway Co.* 1 Wal. 254.

The effect of the agreement for priority of the preference mortgage, was to leave the non-assenting bondholders where they were before, with all their original rights, including a right of priority to all subsequent mortgages, unaffected by equities existing between the assenting bondholders and the preference bondholders. *Huntingdon v. Spann*, 1 McCord, Ch. 167; *United States v. Louisville & Portland Canal Co.*, 4 Dill. 601; *King v. McCully*, 38 Pa. St. 76; *Galveston R. R. v. Cowdrey*, 11 Wal. 459; *Pierce v. Emery*, 32 N. H. 484, and cases *passim*.

The holders of first mortgage bonds had power to relinquish their right of legal precedence, also the power to substitute other persons in their places, wholly distinct and different things; but they did neither. The principles of subrogation are not applicable. *McCormick's Admr. v. Irwin*, 35 Pa. St. 111; *Mosier's Appeal*, 56 Pa. St. 76; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Receivers of New Jersey Midland R. R. Co. v. Wortendyke*, 12 Green Ch. 658; *Jenkins v. Continental Insurance Co.* 12 How. Pr. 66;

Downer v. Wilson, 33 Vt. 1; *Walker v. King*, 45 Vt. 525; *Evans' Pothier*, notes 275, 280, 428-430; *Pardee v. Van Anken*, 3 Barb. 534; *Lamb v. Montague*, 112 Mass. 352, and cases *passim*. *Young v. Montgomery and Eufaula R. R. Co.*, 2 Woods, 606, is distinguishable. Nor can the agreement be construed as an assignment. *Jones Mortgages*, s. 808. Had such an agreement been executed by all of the first-mortgage bondholders, would the court permit the mortgagees under the second mortgage to foreclose under the first mortgage? or would it compel them to foreclose under their own mortgage, giving to that mortgage a prior lien? If the latter, then the agreement in question is simply a waiver of lien. Without an assignment of the debt, there could be no assignment of the mortgage which would be of effect except by estoppel. *Aymar v. Bill*, 5 Johns. Ch. 570; *Hooper v. Wilson*, 12 Vt. 695; *Jackson v. Willard*, 4 Johns. 41; *Swan v. Yapple*, 35 Iowa, 248. An equitable mortgage must have some foundation in contract, or arise by necessary implication from its terms. *Jones Railroad Securities*, s. 77. Thus, the agreement is to be interpreted simply as a personal contract, good between the parties. *Gillig v. Maass*, 28 N. Y. 191; *New York Chemical Manufacturing Co. v. Peck*, 2 Halst. 37. While it exists, it acts in estoppel. *Bank of South Carolina v. Campbell*, 2 Rich. Eq. 179; *Loomis v. Donovan*, 17 Ind. 198. The effect of the agreement, whether intentional or not, was to give the non-assenting bondholders a lien prior to the assenting ones. *Ex parte White*, in *re Jesup v. Wilmington and Manchester Railroad Co.* 2 Rich. Eq. (N. S.), 469. Thus, the preference bondholders must be postponed to the non-assenting bondholders. *Pennock v. Coe*, 23 How. 117. And the assenting bondholders are postponed to the preference bondholders. *Kurtz v. Hollingshead's Heirs*, 3 Cranch C. C. 68.

Guy C. Noble and E. J. Phelps, for first-mortgage and preference-mortgage bondholders.

The objection of the holder of bonds under the consolidation mortgage cannot be made except by cross-bill, nor can it be made against the preferred mortgage.

As to the answer of Nichols it is enough to say that it is not attempted to postpone the lien of non-assenting bondholders.

To the claim made under the cross-bill of Howe and others, there are several decisive answers. The debts of many claimants are not within the scope of the statute. The right given to such as have claims within its scope, is merely a right to attach. If that right is neglected no equity arises. The receivership did not prevent attachment. Had attachments been made, those first in time would have been first in right. The claim that the debts are a charge on the income of the roads is without foundation.

But it is said that the claimants have a lien on the roads them-

selves. That cannot be. *Dunham v. Railway Co.* 1 Wall. 254; *Williamson v. New Jersey Southern R. R. Co.* 1 Stewart, 277; *Denniston v. Chicago, Alton and St. Louis R. R. Co.* 4 Biss. 414; *Meyer v. Johnston*, 53 Ala. 237, and other cases. *Douglass v. Cline* is not law, and the dictum of Waite, C. J., in *Fosdick v. Schall*, is inapplicable.

But in any event the cross-bill cannot be maintained. A cross-bill can be filed only by parties to the original bill. Besides, the cross-bill is joined in by those whose claims are entirely distinct.

Davis & Stevens, for the trustees under the consolidation mortgage.

The assenting first-mortgage bondholders, by consenting to the creation of the preference mortgage, in effect discharged their prior lien, so far as the consolidation mortgage is concerned. That the creation of the preference mortgage was intended to be contemporaneous, makes no difference. The preference mortgage could not occupy the position of the first mortgage, nor receive any benefit therefrom, until that position was vacated by the first mortgage. The law recognizes but one way in which such an object could be accomplished without affecting intervening liens, and that is by assignment and exchange of securities. When the position of the assenting first-mortgage bondholders was so vacated, the consolidation mortgage, being next in point of time, succeeded to the position of priority. *Jones Mortgages*, s. 605, and cases cited.

Belden & Ide, for the orators in the cross-bill of Howe and others.

These orators are parties, and are entitled to maintain a cross-bill. The cross-bill is not multifarious. *Fiery v. Emmert*, 36 Md. 464; *Mount Carbon Coal Co. v. Blanchard*, 54 Ill. 240; *Stone v. Knickerbocker Life Insurance Co.* 52 Ala. 589; *People v. Morrill*, 26 Cal. 336, and cases passim. The matters therein alleged are proper subjects for a cross-bill. *Thielman v. Carr*, 75 Ill. 385; *Stevens v. Stevens*, 11 Green Ch. 101, and other cases.

These orators are entitled to the relief they ask on general equity principles. The law of the subject is extraordinary and peculiar. *Austin v. Rutland Railroad Co.*, 45 Vt. 215. It is to be found in the decisions of the courts of this country. Under the mortgages the bondholders are entitled to no portion of the earnings of the roads until they obtain possession under a decree of foreclosure; and such as they have received they must restore to those who have a superior equity. The mortgages give the companies the right to take the income until default, and "apply the same to the payment of the current expenses." They give the trustees a right to enter only on default after written demand. *Ellis v. Boston, Hartford and Erie R. R. Co.*, 107 Mass. 1, 28; *Douglass v. Cline*, 12 Bush. 619; *Galveston R. R. v. Cowdrey*, 11 Wal. 459; *Smith v.*

Eastern R. R. Co. 124 Mass. 154; Mississippi Valley and Western Railway Co. v. United States Express Co. 81 Ill. 534; Clay v. East Tennessee and Virginia R. R. Co. 6 Heisk. 421; Waite, C. J., in Fosdick v. Schall, 9 Otto, 235. The earnings were more than sufficient to pay these orators. They have gone into the body of the mortgaged property. The bondholders, before taking the property, should pay these orators. Seeking equity, they should yield equity. Myer v. Johnston, 53 Ala. 237. The appointment of receivers was here a matter of discretion, and the court may now impose such conditions as it may consider equitable. Nichols v. Perry Patent Arm Co. 3 Stock. 126; Syracuse City Bank v. Tallman, 31 Barb. 201; Ellis v. Boston, Hartford and Erie R. R. Co. supra; Gurney v. Atlantic and Great Western Railway Co. 58 N. Y. 358; 2 Redf. Railw. 486, and cases there cited; Fosdick v. Schall, and Douglass v. Cline, supra; and cases passim. The money in the receiver's hands "is in the custody of the law for whoever can make title to it." 2 Redf. Railw. 363; Booth v. Clark, 17 How. 322, 331; and numerous cases. The bondholders had no right to the wood, oil, and other personal property that was in the hands of the company when receivers were appointed. It belonged in equity to general creditors. As the receivers have expended it under their appointment, it should be restored by them. Gen. Sta. c. 28, s. 101; Palmer v. Forbes, 23 Ill. 301, and other cases.

But these orators are entitled, under the statute, to a decree giving them a paramount lien on all furniture, cars, engines, and rolling stock taken by the receivers, and, if such property has depreciated in value, it must be made good. Gen. Sta. c. 28, ss. 101, 102. And see the statutes of Kentucky, New Jersey, Pennsylvania, Virginia, and Wisconsin. But it is said the orators lost their right by not attaching. That cannot be, because the bondholders first obtained possession through the receivers. The receivers are the officers of the court. They are ours as much as theirs. The appointment of a receiver fixes no priorities, changes no equities. Booth v. Clark, supra; Jones Railroad Securities, s. 494. The "grab law" does not prevail in a court of equity. 1 Story Eq. Jurisp. s. 547 et seq. Moreover, the mortgages did not cover property of this class as against these orators, and an acquirement of possession would give no additional rights. Nor can the bondholders maintain their position on the ground that the remedy was by attachment only, and that having failed to attach, the right is gone. The creditors, but for the right of the court to control the property, might still attach. Jones Railroad Securities, s. 502, et seq. But the chancellor might allow an attachment. Jones Railroad Securities, s. 504. The court might order the rolling stock to be discharged and allow these creditors to attach it, but it would be more equitable to retain it and afford the desired relief, as, having jurisdiction, it may. Dana v. Nelson, 1 Aik. 252.

Again, the fact that the Legislature intended such property to be available for payment of such debts would be a reason why the court should not aid bondholders to defeat it; and again, if these orators were entitled to hold the property by attachment at law, the bondholders cannot take them into a court of equity without affording them as full relief there; and again, the remedy by attachment could not be exclusive. *Malone v. Shamokin Valley and Pottsville R. R. Co.*, 31 Leg. Int. 260; *Fox v. Seal*, 22 Wal. 424.

The debts evidenced by the notes are still a lien. *Lewis v. Starke*, 10 Sm. & M. Ch. 120, and other cases.

The claims for stationery, printing, etc., and for telegraphing, and the claims of the members of the executive committee, of the superintendent, of the president of the Lamoille Valley Railroad Company, of the chief engineer, and of attorneys come within the statute, and should be allowed.

B. F. Fifield, also for the orator.

The agreement for the precedence of the bonds issued under the preference mortgage operated a mortgage or equitable assignment of the first-mortgage interest to the extent to which the holders of first-mortgage bonds signed it. 1 *Jones Mortgages*, ss. 162, 188; *Jones Railroad Securities*, s. 75.

The claims under the cross-bill that are evidenced by notes are not secured by any lien, as the taking of the notes operated payment and waiver of the lien. *Jones Railroad Securities*, s. 582; *Hutchins v. Olcott*, 4 Vt. 549; *Beech v. Canaan*, 14 Vt. 485. The claims not for materials, etc., for keeping the roads in repair, are not. *Gen. Sts. c. 28*, s. 102.

The statute created no lien, but an exemption in favor of a certain class of creditors, which they might enforce or waive, as they pleased. Had an attachment been made before the receivers were appointed, they might have perfected a lien, but they lost in the race of diligence. *White v. Fuller*, 38 Vt. 193, 202; *Paige v. Smith*, 99 Mass. 395. But it is said that the earnings of the roads have been appropriated to the making of repairs, etc., so that the mortgage security has been enhanced, that the earnings while in the possession of the company are a kind of trust, and that the mortgagee is entitled to his interest, only out of net earnings. There are, however, no proceeds in the hands of the court; money did not go to the mortgagees; it does not appear that anything but net earnings were used in construction. *Douglass v. Cline*, 12 Bush. 608, and the other case cited are therefore distinguishable. See *Jones Railroad Securities*, s. 559; *Galveston R. R. v. Cowdrey*, 11 Wal. 459.

The opinion of the court was delivered by

POWERS, J. On the 1st day of May, 1871, the Lamoille Valley R. R. Co., the Montpelier and St. Johnsbury R. R. Co., and the

Essex County R. R. Co., associated together for the purpose of building a railroad from the Connecticut River to Lake Champlain, and known as the Vermont Division of the Portland and Ogdensburg Railroad Company, in order to raise money to construct, complete, and equip their railroad, executed to Luke P. Poland and Abraham T. Lowe, as trustees, a trust deed of their railroad, including all its real and personal property, together with the tolls and income and all their corporate rights and franchises, in trust to secure the payment of \$2,300,000 in joint bonds issued by said companies, with semi-annual interest coupons attached. In the habendum it is stipulated that the conveyance is made and accepted upon trusts, and subject to limitations and conditions:

First, to secure the payment of the principal and interest upon the joint bonds ratably and without preference, etc., and further as follows:

Third. Upon trust until default shall have been made by the parties of the first, second, and third parts in payment of the principal or interest of said bonds, or some of them, or until default shall have been made in respect to something herein agreed or required to be done by them, to suffer and permit the said parties of the first, second, and third parts to possess, use, occupy, manage, and operate the said railroad property, franchises, and appurtenances, and to renew, replace, and repair the said property and every part thereof, and take, receive, and use the tolls, rents, issues, incomes, and profits thereof, and apply the same to the payment of the current expenses of the roads, and to the purchase of necessary machinery and equipment, or dispose of the same for the lawful uses of the said parties of the first, second, and third parts, in any manner not inconsistent with this indenture. And the boards of directors of said several companies may likewise distribute and pay any net annual incomes to stockholders, after providing for the interest on any and all bonds which said companies may owe.

Fourth. Upon trust that in case the said parties of the first, second, and third parts shall fail, neglect, omit, or refuse to pay the principal of, or the interest upon, the said bonds or any thereof, as the same shall respectively become due and payable, and such failure, neglect, omission, or refusal shall continue for the period of four months after the payment thereof shall have been demanded in writing, then the said parties of the fourth part, or either of them, upon the refusal of the other or their successors in said trust, may by themselves, or their attorneys, agents, or servants in that behalf, upon the written request of the holders of a majority in amount of such bonds then outstanding in respect whereof there shall have been any such failure, neglect, omission, or refusal, enter into and upon, and take possession of, all, or, in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroads and receive the

income, receipts, and profits thereof, and out of the same pay: 1st. The expenses of running and operating the same, including therein such reasonable compensations as they or he may allow to the several persons employed or engaged in running and superintendence of the same, and all taxes, assessments, charges or liens having priority or preference to the lien of these presents upon the said premises, or any part thereof, and a reasonable compensation to the parties of the fourth part, or their successors, or such of them as shall act in the premises, for their or his care, diligence, and responsibility in the premises, and for the services of such attorneys and counsel as may have been by him or them employed, and also the expenses of keeping the said road and appurtenances, the locomotives, and rolling stock thereof in good and sufficient repair, etc.

Under the sixth trust specified the trustees were empowered, after a default for six months, and on request of the holders of three-fourths in amount of outstanding bonds, to take possession and sell the mortgaged premises at auction. On the 1st day of April, 1874, said companies executed a second mortgage of the same property to the same trustees, to secure the payment of joint bonds to the amount of \$1,770,000, and upon the same trusts as those expressed in said first mortgage. About \$125,000 only in bonds were issued under this mortgage. On the 1st day of January, 1875, said companies, jointly with the Lamoille Valley Junction Railroad Company and the Maine Division of the Portland and Ogdensburg Railroad Company executed a third, called a consolidated mortgage of their several railroads to said Poland and Israel Washburn, Jr., and P. H. Brown, as trustees, to secure the joint bonds of all said companies, to the amount of \$9,500,000, and upon like trusts to those expressed in said first mortgage. About \$80,000 of this class of bonds were issued. The first-named three companies, having expended the proceeds of all said bonds and being insolvent, and said second and said consolidated bonds being unsalable, and the sum of \$500,000 in money being necessary to complete their railroad, on the 18th day of July, 1876, executed a fourth, called a preference mortgage of all the property, rights, tolls and income described in said first mortgage to said Poland, trustee, in trust to secure the payment of \$500,000 in joint preference bonds, issued by said companies, and upon the other trusts expressed in said first mortgage. And it was provided in said last-named mortgage that no bonds should be issued under it, until the holders of first-mortgage bonds to the amount of eighteen hundred thousand dollars should have signed an agreement in writing, in the following words, to wit: "We, whose names are hereto subscribed, holders of bonds of the numbers and amounts set against our respective names, issued under, and secured by, the first mortgage of the Essex County R. R. Co., of the Montpelier and St. Johnsbury R. R. Co., and of the La-

moille Valley R. R. Co., hereby severally agree that for the purpose of completing and equipping the line of the said several roads to Lake Champlain, in Swanton, Vt., under existing contracts or otherwise, and of paying the interest on the debts, for the payment of which a portion of such bonds are pledged, the said several railroad companies may issue bonds to be denominated preference bonds, in character like the first-mortgage bonds, to the amount of five hundred thousand dollars, secured by a joint mortgage of the several railroads and their equipment like unto the first mortgage thereof, which shall constitute and be a lien on the same prior to the bonds held by us severally, the mortgage and bonds to be made to Hon. Luke P. Poland as trustee; said preference bonds to be payable, principal and interest, in gold, in twenty years, and at the option of said companies after five years from the 1st day of May, A.D. 1876, and to bear interest at the rate of six per cent. per annum semi-annually. This agreement and consent is not to be binding until the holders of the first mortgage bonds to the amount of eighteen hundred thousand dollars shall execute the same, nor until the trustee in the preference mortgage, being one of the trustees of the first mortgage, shall consent hereto in writing; said preference bonds are not to be pledged or sold for less than their par value without the consent of said trustee, and none of said bonds are to be issued by said trustee until he is fully satisfied that the said companies have made such arrangements and contracts that the issue of said bonds will accomplish the completion of the line to Lake Champlain, and that said companies will pay the interest on the debts for the payment of which the first-mortgage bonds are pledged, for at least two years from the date of the preference bonds." And the said paper was signed by the holders of first mortgage bonds, stating the numbers and denomination of the bonds held by each, to about the amount of eighteen hundred and seventy thousand dollars. And said Poland gave his consent as trustee thereto in writing, as provided in said agreement. Default in the payment of interest upon the first mortgage bonds was made in May, 1876, and about that time upon all classes of said bonds, and October 18, 1877, this bill was brought by the trustee under said preference mortgage, asking to have the priorities of said securities ascertained, an account of all said bonds taken, and for a proper decree of foreclosure. The bill also alleged that the roads of said companies were very incomplete, and must soon have a very considerable expenditure of money thereon, to run with safety; that said companies were largely indebted to many persons, who were not secured upon the property, and that if said roads remained in the hands of said companies, all the earnings thereof and all the personal property would be taken for the payment of such debts and diverted from the payment of the interest due to mortgage bondholders; and that the orator, as trustee under said preference

mortgage, had wholly declined to take possession of said roads and run them, as trustee, as had the trustees under the first mortgage, and that they regarded it "as simply impossible for them so to do, without the greatest peril of pecuniary loss and ruin to themselves." The bill also prayed that the court would appoint some suitable person or persons as receivers to take possession of said roads and property, and operate the same under the order and protection of the court until a final decree should be made in the premises.

A cross-bill was filed by the trustees under the first mortgage, with like prayer for relief. The bill and cross-bill also contained an allegation that the orator was informed and believed that said companies, in running and operating their roads, jointly became and were indebted for services and supplies furnished for such purpose to various persons who claimed to have some kind of equitable lien on the roads, or the personal property thereon, or the earnings and income thereof, and that George E. Howe of St. Johnsbury, Vt., and Capen, Sprague & Co. of Boston, Mass., claimed to be creditors of that class, and asked that they might be made defendants, to represent their own claims and all others having like claims. Receivers were appointed October 18, 1877, upon the filing of the original bill who immediately took possession of all said property and still hold it. The original and cross bills were answered by the trustees and sundry bondholders under the consolidated mortgage, and by J. R. Nichols, a first-mortgage bondholder, who did not assent to the preference mortgage, and by George E. Howe, Capen, Sprague & Co., unsecured creditors named in said bills. These creditors also filed a cross-bill, claiming a priority upon the personal property described in said mortgages, and upon the earnings of said mortgaged property, for the payment of their claims. This latter cross-bill was answered by the orator in the original bill, and by certain holders of first-mortgage bonds, denying all equity therein. It was also demurred to by sundry other bondholders. A master was appointed to take an account of the several classes of bonds, and an account of the debts of George E. Howe, Capen, Sprague & Co., and other creditors in said last-mentioned cross-bill named, and claiming to be preferred creditors. The cause was heard before a chancellor, at the June Term of the Court of Chancery of Caledonia County, and a pro forma decree entered upon said cross-bill of the trustees under the first mortgage, in favor of said trustees, for a foreclosure against the trustees and bondholders under said second and consolidated mortgages and said companies. And, in case such decree became absolute, the decree further ordered a foreclosure in favor of said trustee under the preference mortgage against said companies and such holders of first-mortgage bonds as assented to the preference bonds, unless said preference bonds be paid within a time therein limited, and further ordered that said trustee be subrogated to and hold all the right

and interest of said assenting bondholders in said first mortgage, or the property covered by the decree of foreclosure upon said first mortgage, and further ordered that the cross-bill of the preferred creditors be dismissed. The trustees under the consolidated mortgage, J. R. Nichols, a non-assenting first-mortgage bondholder, and the preferred creditors appealed.

The first question presented upon this appeal is, whether the preference bonds are entitled to the priority which the parties concerned in their issue intended they should have. No one of the first-mortgage bondholders who assented to the issue of the preference mortgage by the railroad companies, and who signed the agreement above recited, dated April 7, 1876, is here objecting to the priority now claimed for the preference bonds; but they stand in court content to have the priority of the preference bonds accorded to them as agreed, and the duty of redeeming their interest in the first mortgage enjoined upon them as ordered by the decree below. The appellant Nichols claims that by the transaction resulting in the preference mortgage, the non-assenting first-mortgage bondholders alone now hold the security of the first mortgage. The trustees under the consolidated mortgage claim substantially the same thing. The bonds issued under the first mortgage share ratably and without preference in the mortgage security. The whole amount issued was \$2,300,000. Those assenting to the preference mortgage in round numbers amount to \$1,800,000, and the non-assenting to \$500,000. The non-assenters, therefore, own five twenty-thirds of the first mortgage. Nothing can advance the fractional share of the non-assenters, except an extinguishment of the bonds of the assenters, or a cancellation of the security pledged for their payment. Neither event has transpired. The bonds are as valid now as before the execution of the agreement and the preference mortgage. The security of the first mortgage is still pledged for their payment, as before. No attempt was made—none could successfully be made—to give a priority to the preference bonds over those of the non-assenters, or, by a kind of tacking, to postpone the consolidated bonds. The assenters undertook to deal with their own bonds and security in a way to improve their value. If the assenters had pledged their bonds to A for collateral security, their ratable share of the first mortgage would go to the assignee. Leave the fact of the preference mortgage itself out of view, and suppose that the assenting first-mortgage bondholders, desiring to raise money to complete the road and thus make their security valuable, had loaned of A \$500,000, and pledged their interest in the first mortgage as security, by an instrument as informal as the agreement in question; would not a court of equity, as between the parties, treat the agreement for security as security? That is precisely the effect of this agreement. The assenters said to the preference bondholders,

You lend your money to the companies to enable them to complete their road and take their mortgage, which, as a lien upon the property, must be subject to all existing incumbrances, and we will give you as a further security, our interest, or eighteen twenty-thirds of the first mortgage, as collateral. We will encumber that interest with the burden of your debt. We agree that your bonds shall be a prior lien upon the property. Is there anything in this transaction prejudicial to the rights of other parties interested in the property, or anything incapable of practical enforcement in a court of equity? The preference bondholders did not lend their money upon the mortgage by the companies of a property already hopelessly buried under the load of three existing mortgages, nor on the credit of the insolvent companies. They demanded security, and the assenters undertook to give security. There can be, then, no question as to the purpose of the agreement. The agreement is that the preference bonds shall be a lien upon the property prior to the bonds held by the assenters—not prior in time, but prior in order of payment. This agreement was incorporated into the bonds themselves and thus made them an equitable mortgage. Jones Railroad Securities, s. 75. A lien upon the property prior to the bonds of the assenters could only be created by subordinating their lien to the new lien—that is by mortgaging the first as security for the second. There is nothing in the estate of a mortgagee that makes such a mortgage in equity invalid or impossible. Want of form is immaterial. Equity looks only to the substance, and so moulds that into form as to work out the intent of the parties. A mere agreement to give a mortgage is treated in equity as a mortgage. 1 Jones Mortgages, ss. 163, 167; Jones Railroad Securities, s. 73 et seq. Even if the agreement undertakes to mortgage a thing not in esse, equity will treat the contract as a mortgage when the thing comes into being, and charge it with a lien in favor of the party intended. Jones Railroad Securities, s. 122, and numerous cases there cited. When, therefore, the decree in favor of the first mortgage bondholders becomes absolute, the assenters will hold their interest charged with the lien agreed to be given to the preference bonds. An equitable mortgage will not be upheld which works a wrong to third parties, but where their interests are undisturbed they are enforced for the purpose of executing the intent of the parties. *Miller v. Rutland and Washington Railroad Co.* 36 Vt. 452; Jones Railroad Securities, *passim*. To carry out the intent of the parties in this case works no wrong to the non-assenters, as they stand under the decree precisely as they would if no preference mortgage had been made; nor to the consolidated bondholders, as they must redeem only so much as they voluntarily assumed when they took their mortgage. The invalidity of the agreement is not urged by the party bound by it, and neither of the appellants ought to be heard to question it, much less to profit by

it. By what system of logic is it established that this attempt to give security is to be held inoperative to effectuate the purpose intended, but operative to work a forfeiture of eighteen twenty-thirds of the first mortgage? What has occurred to advance the interest of the non-assenters from five twenty-thirds to twenty-three twenty-thirds of that mortgage? The transaction amounts to a mortgage, or it is altogether inoperative. By it the interest of the assenters either passed in pledge or did not pass at all. If it did not pass, it remains where it was lodged before, and the assenters still own their fractional share in the first mortgage. To say that a court of equity shall defeat the purpose of this scheme that was devised, and has been operative to make the first mortgage more valuable—the share of the non-assenters equally with the rest—and at the same time declare that by means of it the share of the non-assenters, who have paid nothing, has been magnified fourfold, is a novel proposition to advance in a court of equity. All the advantage that the non-assenters can reap from the transaction is found in the increased value of their security.

The questions arising upon the cross bill of George E. Howe and others are new in this State, but are of easy solution. These orators as a class are seeking to enforce a common right against a common fund which they claim is, in equity, chargeable in their favor. The bill is not multifarious, and these orators have a proper standing in court. They insist that the companies were indebted to them at the time receivers were appointed for service rendered and supplies furnished to the railroad, and that the seizure of the property by receivers has not defeated their right to charge the chattel property and the net earnings of the receivership with the payment of their claims. They predicate their claim first upon sections 101 and 102, c. 28, Gen. Sts., which read:

“Section 101. All mortgages of railroad franchises, furniture, cars, engines, and rolling stock of any kind, when properly executed and recorded, shall be effectual to vest in the mortgagee a valid mortgage interest in and lien upon all such property without delivery or change of possession; and for the purpose of mortgage, all such property shall be deemed part of the realty.

“Section 102. Provided nothing in the preceding section shall prevent such furniture, cars, engines and rolling stock from being attached by any person having a claim against the corporation owning such property, for an injury sustained on the road of said corporation by reason of any neglect of said corporation, or for services rendered or materials furnished for the purpose of keeping said road in repair, or in running the same, or for any liabilities as common carriers, or for the loss of any property while in the possession of said corporation; and such property, when so attached, may be taken, held and disposed of in the same manner as it could have been if that section of this chapter had not been passed.”

At the time the several mortgages above described were executed, we had no law in this State authorizing the execution of chattel mortgages, and but for this section (101) such mortgage of chattel property by railroad companies would be invalid as against creditors and purchasers. To obviate this embarrassment section 101 was passed, enabling railroad companies to make a valid mortgage of personal property. But section 102 is a proviso to section 101. The intent of the section is that such a mortgage shall be inoperative against the liabilities specified. It affirms the right to attach the chattel property, and hold and dispose of it in the same manner it could have been done if that section had not been passed. If that section had not been passed such mortgage, without change of possession, would be void as to creditors.

As against the preferred creditors, the property remains unincumbered by the mortgage. This statute was in force long before the execution of the mortgages hereinbefore described. The bondholders, therefore, took their security with notice of its subordination to the rights of such claimants. In view of the necessity of a change of possession to make such a mortgage effectual, it is clear that no court of equity would undertake, by means of a receivership, to seize the property and give to the mortgagee a possession that would or could operate as a substitute for the possession required by the statute, especially upon the ground avowed in this bill, that the trustee cannot afford to take possession, and asks the court to do so to prevent the exercise of this very right of attachment which is accorded to these creditors. Such a proceeding would work a nullification of the statute; it would be an attempted overthrow of a legal right and priority which no court has the power to accomplish. The doctrine is elementary that the appointment of a receiver alters no existing rights in respect to the property seized. It merely stays the enforcement of rights by the parties in interest for the time being. It operates like an injunction pendente lite. By the terms of the deed of trust the trustee, upon default in the payment of interest on the bonds for four months after demand, and on request of a majority of the bondholders, was empowered to take possession of the property, run and operate the road, and take the income. Counsel argue that this entry into possession was accomplished by the creation of the receivership, that the receivers are holding for the mortgagees, that the receivership was the result of a "race of diligence" between the bondholders and these creditors, and that the only right accorded the creditors by the statute was the right to attach the property, if by diligence they could reach it, before the bondholders seize it. Whatever might be claimed for a possession by receivers, established upon other grounds, it is obvious that in this case they do not hold solely for the mortgagee. The authorized representative of the bondholders declined to take possession under his

mortgage right. He implored the court to take possession, not for him nor those he represented, but to prevent these creditors getting in, and asked the court to hold the possession, and operate the road by receivers until a final decree be made in the premises. The receivers hold for whom it may concern. The creditors are made parties defendant to the bill and cross-bill, they are asked to set forth and litigate their right, they have done so upon proper averments and proofs, and upon answer made to their claim. The final decree, therefore, "which shall be made in the premises" will determine the priority to this chattel property, which, among other things, the court is asked to seize. The receivers hold for the contending parties—for the creditors as well as all others interested. Although the statute accords the right of attachment—a right merely to proceed at law—still, this right is to have effect in equity if the creditors standing upon it are summoned to that forum to establish it. It verges upon serious trifling to say to these creditors, you ought to have attached this property, and not slept upon your rights a year or more until the court seized it. It is subjecting the valuable substance to technical mode and form, and enabling crafty vigilance by the aid of the official signature of a chancellor to place that valuable substance beyond the reach of those entitled to it, not by any adjudication that changes the character of the right itself, but a change of venue that renders the statutory remedy technically improper in the new posture given to the property. Section 102 makes the chattel property attachable on a claim for a personal injury on the road. If A receives a severe injury by the gross negligence of the company, could the company screen the property from liability by a "change of ministry"? Could the bondholders wrest the property from liability by securing receivers upon an ex-parte application and hearing, before A had even had time to take out process? Is this new way of paying old debts to receive the sanction of a court of equity? The right to attach the chattel property exists now as perfectly as before the appointment of receivers, but the court adjudged that the best interest of all concerned would be subserved by enjoining the exercise of the right, and having so determined, it is not supposable that the court would surrender the property to an attaching officer now, thus ending all occasion for a receivership. The litigation of this question having begun in equity, and the court having assumed the handling and custody of the property, the case will be retained in that court for the final determination of all questions arising under the claim of any party interested. These creditors having a priority of legal right and the creation of a receivership conferring no new rights upon the mortgagees, it is for the court to give effect to this priority in the administration of the property. The receivership is to be made chargeable, as holding the chattel property subject to the

prior right of these creditors to have it made answerable to their claim.

The master's report shows that the chattel property, when taken by the receivers, was worth enough to satisfy these preferred claims. It has been used in the operation of the road, and, consequently, some of it has been consumed and destroyed, and all of it much worn and depreciated in value. Other property of like kind has to some extent been supplied in its place, but this is not all available to these creditors. The property taken by the receivers was ample security for the payment of these creditors. The receivership must be made debtor accordingly, and held to respond from such resources as it has, properly applicable for that purpose. The ground of the application for the receivership was, the danger that these creditors would attach the chattel property, and that all its earnings and the earnings of the road would be taken to pay the unsecured creditors. This application could have been fully answered by an injunction. In that case, security for consequential damages would be furnished by bond, and the property would have remained in the custody of the mortgagor, pending the proceedings to foreclose. The receivership without bond of indemnity cannot be permitted to operate differently upon the claims, rights and interests of the unsecured creditors from an injunction, nor work a greater embarrassment upon the assertion and realization of such claims, rights, and interests.

We have thus far considered the equity of these creditors to have this chattel property made available to them, as flowing from the priority given them by the statute in question. But there is another ground, equally tenable, upon which the receivership is equitably bound to respond by applying the net income of the railroad property in payment of these debts. As we have seen, this mortgage is made upon the trust that, until default made in the payment of interest, the mortgagor shall remain in possession, operate the road, take the tolls, rents and income, and apply the same to the payment of the current expenses of the road, or dispose of the same for the lawful uses of the mortgagor. The mortgagees took their security burdened with this trust. The claims of these creditors are "current expenses of the road." They should have been paid by the mortgagor out of earnings. If the earnings had been kept intact, and, on the appointment of receivers, had been delivered to them in cash, would not a court of equity order that they be first applied in satisfaction of all back arrearages of expenses incurred by the mortgagor in the operation of the road? The mortgagees could not object, because they agreed that these earnings should be so applied. The receivership altered no rights in this respect, unless the doctrine that the "race of diligence" gives to the mortgagees earnings that they have agreed belong to other parties, can be upheld. The mortgage of the tolls and income does

not give these earnings to the mortgagee—all that passes under such a mortgage is net income. Income means what is left after paying the expenses of earning income. The trustee declines to take possession, and asks the court to exercise an unusual and extraordinary jurisdiction in appointing receivers. Seeking equity, he must do equity. The court might at the outset make it a condition in the appointment of receivers that these debts should be paid, or require security for them to be furnished, or the order can be made at any later stage of the proceedings. *Fosdick v. Schall*, 9 Otto, 235; *Ellis v. Boston, Hartford & Erie R. R. Co.* 107 Mass. 1; *Douglas v. Cline*, 12 Bush. 608; *Duncan v. Ches. & Ohio R. R. Co.* 15 Am. Law Reg., N. S. 428, and many other cases. No case has been cited to the contrary, and probably none can be found. By the terms of the mortgage, the mortgagor was bound to pay these debts from current earnings. The mortgaged estate is now equitably indebted for the same. It would be highly inequitable for the receivers to take the estate, relieved of this equitable burden. Until the mortgagee takes possession of the road he has no right to its earnings superior to the mortgagor. The earnings follow the possession. Whoever holds possession of the thing that makes earnings, takes the earnings made. Here the receivers hold possession for all parties in interest. The parties in interest are the mortgagees, the mortgagors, and these preferred creditors, and the receivers must distribute net earnings among these parties, as their respective equities may appear. A large amount of net earnings has already been expended in making new road, thus enhancing the value of the property as a security for the bonded debt. This chattel property, upon which these creditors have a claim paramount to the mortgagees, has been used and much of it worn out in making this net income so expended. After default in payment of interest, the mortgagor was suffered to remain in possession, and incur the debts of these creditors in repairing the road and in running it in the fulfilment of its duties to the public. Can it be said that the mortgagees shall now be permitted to say that they have a superior equity to take the benefits of these services, take the use of this chattel property, and take the increased value of their security, without obligation to do equity? Can they return the chattel property in its depreciated condition in full satisfaction of the claims of these creditors upon it? The mortgagor has no equity to the net earnings. The question, then, is limited to the relative rights of the mortgagee and these creditors. As between these parties, under the circumstances of the case, it is beyond question that the receivership is bound to apply its net income first to the discharge of these claims. It is to be noted that this application of net income is merely paying an obligation that equitably rested upon a portion of the property seized by the receivers, and which has been largely consumed to the advantage of the mortgagee, and thus con-

sumed upon the mortgagee's express request, and that net income is the only resource in the first instance that is properly applicable to the discharge of any debt of the receivership except expense of operation. The Supreme and Circuit Courts of the United States have repeatedly promulgated this doctrine, and the highest courts of many of the States have concurred in it. See cases *supra*. If any case denies the doctrine, it has not been shown to us.

What creditors under the statute have this preferred right to attach this chattel property? It is clear that construction expenses are excluded in section 102. It is clear that general creditors are excluded. The statute (section 101) makes the mortgage valid against all creditors, except those especially enumerated in section 102. Every liability specified in section 102 grows out of the actual operation of the road. It is a matter of general notoriety that the construction and operation of railroads give rise to great conflicts of interest between security-holders, which portend imminent peril to the wages of employees. This statute was intended as a protection to them. It was the purpose of the Legislature to protect a class of employees who could not protect themselves. The protection afforded, however, is in derogation of the rights of other creditors, and therefore cannot be extended by construction beyond the class of creditors specified. *Lehigh Coal and Navigation Co. v. Central Railroad Co.*, 2 Stewart, 252; *Pennsylvania and Delaware Railroad Co. v. Leuffer*, 84 Pa. St. 168. In nearly all the States, statutes of similar import exist, all having the same object of giving protection to a class of operatives, who, scattered along the line of a railway, are engaged in a service that precludes sharp watchfulness over the solvency and honesty of their employers, and lack the means and opportunity of guarding their own interests. The master has made a list of claims for services rendered and materials furnished in repairing and operating the road. Some of the claimants named in this list might, from the duties they are generally understood to perform, be properly excluded from the preference accorded by the statute, such as the cashier and paymaster, and perhaps some others. But the difficulty is, that although the mortgagees interested to defeat the allowance of these claims, appeared before the master by counsel, and made specific objection to many claims, yet so far as appears, they made no objection to any claim enumerated in this list. No exception to the report raising any question upon this list of claims has been filed. No suggestion is made, in brief, or argument, by any of the numerous counsel who have been heard, that this list of claims included any claimants not entitled to share in the privilege given by the statute. It is not the business of the court to purge a list of claims that the parties do not question, but we are to treat it as the parties treat it, namely, as conceded to be correct. Some of the claimants have taken promissory notes for the amount of their

debts. Taking a note for an antecedent debt is in this State presumably a payment of the debt; but the question is one of intent. If the debt is one that carries a security or priority, it is not to be presumed that a mere change in the form of the indebtedness was intended to defeat its priority, when the debtor is confessedly insolvent. The statute must be construed in a way to carry out the intent of the Legislature. When, therefore, it accords a priority to claims for "services rendered or materials furnished for the purpose of keeping said road in repair or in running the same," it is not to be extended beyond the obvious import of the language used. Services rendered in keeping the road in repair might be construed so as to include the officials of the road, but it was the intent of the Legislature to include only such persons as were engaged in manual labor in making repairs. Services rendered in running the road includes the same class of operatives and employees. The dividing line is between services rendered in the official and executive management and authority over the work of making repairs and running the road, and such laborers and employees as do this work. The employers are excluded, the employees included. Such is the rule adopted in other states having similar statutes. Thus directors are excluded. The superintendent who is an employee in his relation to the corporation, is an employer in his relation to the work of repairing and running the road. He is the alter ego of the corporation itself. He is not within the privilege of the statute. *Jones Railroad Securities*, s. 580. Nor is the civil engineer. *Pennsylvania and Delaware Railroad Co. v. Leuffer*, *supra*; *Brockway v. Innes*, 39 Mich.; *Jones Railroad Securities*, s. 580. Nor heads of departments, general agents, and attorneys. *Jones Railroad Securities*, *supra*, and as the latter claimants cannot gain a priority over general creditors for their services, they cannot gain it for rent of offices and stationery used, or telegraphing ordered by them. Such expenses are usual and proper in the operation of a railroad, so are the services of directors and attorneys, but they are general debts of the corporation. It is said that the charges for printing tickets, bill-heads, posters, time-tables, etc., ought to be treated as materials furnished in running the road. It would be rather difficult to classify such supplies as materials furnished for keeping the road in repair. The word materials has substantially the same meaning when used in connection with the work of repairing, that it does in the work of running the road, and means such supplies as are indispensable in making repairs upon the road or its equipment, and are annexed to the property and become part of it, or are consumed by it, in its use, such as iron, ties, lumber, wood, coal, oil, etc. The same word is used in the statute giving a lien upon buildings, steamboats, mills, factories, machinery, etc., to mechanics and material-men. The statute creating mechanics' liens belongs to the same class of legislation as the statute in ques-

tion. It has the same general object, applies to the same class of persons, and works out substantially the same relief. The mechanic has a lien by law, provided he follows it by his attachment of the property. The railroad employee has a lien by law, if he first makes attachment and thereby creates it. In the latter case, a lien upon the road-bed and superstructure would be of little value to the creditor, and hence the right to acquire it by attachment is limited to such property as can be made practically available.

The ground and reason of giving to a creditor who has furnished materials for repairing, erecting, or operating a factory a lien upon it or its machinery, is, that such supplies have been incorporated into the building, and thus not only lost their identity as chattels, but have increased the value of the principal thing to which they are annexed. *Stout v. Sawyer*, 37 Mich. 313; *Grosz v. Jackson*, 6 Daly, 463. *Philips Liens*, *passim*. If a printer who supplied posters and tickets to officials running a steamboat or a theatre, could fasten a mechanic's lien upon the boat or building, upon the theory that he had furnished materials for such structures within the meaning of the statute, he could gain a like priority in this case. Such is not, however, the construction given to this word as used in the statute relating to mechanics' liens, and it ought not to be so construed in the statute in question. The word made use of (materials), looked at in connection with the general purpose of the statute, clearly refers to supplies of a different nature from printers' bills or printed matter.

The decree below, dismissing the cross-bill of the preferred creditors, must be reversed, and such of them as have brought themselves within the statute are entitled to relief.

In view of the condition of the road and its duties to the public and its security-holders, a reasonable time should be allowed to the parties in interest to provide for the payment of these claims without serious embarrassment to the operation of the road, and failing to make such provision, the chattel property named in the statute should be sold under the order of the court, and the proceeds ratably applied in payment of these claims, and if any part thereof then remains unsatisfied, the net earnings of the receivership must be applied to extinguish the same.

The cause is remanded, with mandate embodying the views herein expressed.

See *Delaware, etc., R. R. Co. v. Oxford Iron Co.* and note 1 Am. & Eng. R. R. Cas. 205. *Williamson v. Washington, etc., R. R. Co.*, 1 Am. & Eng. R. R. Cas. 498. *Gibert v. Washington, etc., R. R. Co.*, Am. & Eng. R. R. Cas. 512. *Taylor v. Phila., etc., R. R. Co.*, 1 Am. & Eng. R. R. Cas. 632.

MASTERSON

v.

THE WEST END NARROW GAUGE R. R. CO., APPELLANT.

(72 Missouri Reports, 342. October Term, 1880.)

A railroad company, under an unrecorded license from the owner, surveyed, located and partly graded its road across a tract of land, and then suspended work. The owner afterward executed a mortgage, which covered the strip appropriated by the company, to a person who had no actual notice of the company's rights or of the work done. *Held*, that he was not bound by the license.

Prior to default in the payment of a debt secured by mortgage, the mortgagee has no right to forbid the mortgagor or his licensees from doing any work on the mortgaged premises which will not impair their value as security. But after default he may, and under some circumstances equity requires that he shall, interfere. Thus, if he knows that a railroad company is building its road across the premises, under a parol license or an unrecorded deed given by the mortgagor prior to the default, it is his duty to notify the company of his rights, and to forbid the further prosecution of the work. If he fails to do this, and the company afterward makes expenditures upon the work, the license of the mortgagor will be held to be his license also.

Appeal from St. Louis Court of Appeals.—The case is reported in 5 Mo. App. 64.

Affirmed.

Jeff. Chandler for appellant.

Defendant's predecessor acquired absolute title to the premises in controversy by the license from Gay, the then owner. Verbal permission from the owner to a railroad company to take land for railroad purposes followed by occupation by the company, constitutes complete and absolute dedication. 1 Wag. Stat., 326, § 1; Washburn on Easements, (3 Ed.) 185. The right that a railroad company takes is simply an easement, though expressed to be a fee simple; (Kellogg v. Malin, 50 Mo. 496;) and may be verbally given either at common law or under the statute. Washburn on Easements, 179, § 10; Seifert v. Withington, 63 Mo. 577. A railroad company cannot condemn when verbal consent can be had. Wag. Stat., 326, § 1; Lind v. Clemens, 44 Mo. 540; Ellis v. Pacific R. R. Co., 51 Mo. 200; Cunningham v. Pacific R. R. Co., 61 Mo. 35; Han. and St. Jo. R. R. Co. v. Muder, 49 Mo. 165; K. C., St. Jo. and C. B. R. R. Co. v. Campbell, 62 Mo. 585. Therefore, verbal assent of the owner becomes a substitute for, and equivalent to a condemnation, and vests the same title in the corporation that condemnation would. Possession being sufficient to consummate dedication, no notice is necessary, but every one is presumed to have notice of a highway. Patterson v. Arthurs, 9 Watts, 154; Washburn on

Easements, 70. When a man buys a piece of land with a railroad on it, he takes the land cum onere, and cannot recover for the original taking. *Hentz v. Long Island R. R. Co.*, 13 Barb. 646; *Washburn on Easements, 70*; *Central R. R. Co. v. Hetfield*, 29 N. J. L. (5 Dutcher) 206. Such incumbrance might be a breach of the covenant in the deed against incumbrances, but would not authorize a suit in ejectment. *Kellogg v. Malin*, 50 Mo. 496. But the evidence shows that even after plaintiff bought the land he demanded damages for the land, and not the land itself. He assented to the land being used, and demanded instead of the land money therefor, which was and is inconsistent with a claim for the land. The slightest assent to the use of the land for a railroad will defeat ejectment. *Provolt v. Ch., R. I. and P. R. R. Co.*, 57 Mo. 261.

Leverett Bell and W. B. Thompson for respondent.

Plaintiff's record title is complete. He had no actual notice of the location, partial construction or existence of the railroad across the premises until May 17th, 1875, when he first visited the property. The defendant relies upon a parol license, an unrecorded right, to defeat the title of plaintiff, who is a purchaser for value without actual notice. The burden of proof is upon the defendant to establish the existence of such a state of facts at the inception of plaintiff's title in May, 1874, as in law constituted constructive notice to plaintiff of the rights, if any, vested in the St. Louis and Florissant R. R. Co. by the parol license from Gay. It may be conceded that if in May, 1874, there had been a completed railroad across the premises in operation with trains, etc., these facts would have constituted actual possession of the premises, under the parol license, and would have been constructive notice to plaintiff of the rights of the railroad company. The case made by the testimony in this case bears a different aspect. *Merritt v. N. R. R. Co.*, 12 Barb. 605. Ejectment is the proper remedy. *Walker v. R. R. Co.*, 57 Mo. 275.

HOUGH, J.—This is an action of ejectment to recover a strip of ground situated in the city of St. Louis, upon which the railroad of defendant is located.

Both parties claim under William T. Gay. At the trial in the circuit court the plaintiff read in evidence a deed of trust, dated May 27th, 1874, and recorded May 29th, 1874, executed by William T. Gay and wife to A. M. Britton, trustee, to secure to plaintiff a principal note of \$29,000, due in five years, and ten semi-annual interest notes, all executed and delivered by said Gay to plaintiff, and of even date with the deed of trust, conveying a tract of land embracing the premises sued for; also the deed of William T. Gay and wife, by said trustee, dated June 8th, 1875, recorded

June 9th, 1875, conveying to plaintiff, pursuant to a sale made under said deed of trust, said tract of land. Testimony was given by plaintiff tending to show "that he never had actual notice, nor actual knowledge, nor actual information, that a railroad had been surveyed, or located, or in part or in any manner constructed upon the premises sued for, until his first visit to the premises, which occurred about three weeks before June 8th, 1875." The value of the monthly rents and profits and the amount of damages were established, and plaintiff rested his case.

The defendant gave in evidence a deed from William T. Gay and wife to the St. Louis and Florissant R. R. Co., dated September 19th, 1874, recorded September 23d, 1874, conveying in consideration of \$1, the right of way for said railway, along and upon the premises sued for; also documentary evidence showing that the defendant had succeeded to the rights of the St. Louis and Florissant R. R. Co. Oral evidence was given on defendant's behalf tending to show that in 1872 the St. Louis & Florissant R. R. Co. surveyed and located its railroad upon the premises sued for with the verbal permission of William T. Gay, and subsequently in 1873 the right of way across said premises for said railroad was conveyed by deed of said Gay to said company; said deed, however, was never recorded and was lost, and the deed of September 19th, 1874, read in evidence, was in lieu thereof. In 1873 some grading was done by the company along the line of the railroad and upon the premises sued for. The work was suspended in that year by reason of the panic, and in 1874 the last work on the road by the St. Louis and Florissant R. R. Co. was performed, and said corporation became insolvent, and in January, 1875, its property, etc., was sold under a mortgage dated August 20th, 1874, and purchased by Lionberger, and by him conveyed to the defendant February 1st, 1875, and in 1875 defendant entered and commenced work upon the premises in question, and put in culverts and erected trestle work and finished the embankment and laid the iron and ties, so that upon May 29th, 1875, the first construction train, and on June 12th, 1875, the first passenger train passed over the premises, and thereafter defendant fenced in the premises. The plaintiff never objected to defendant's operations until about a month after the cars commenced running, when he demanded payment for the land in dispute.

It does not plainly appear when the road was completed so as to be ready for the cars, nor does it appear when the default occurred in the payment of the notes made by Gay to the plaintiff, for which the land sued for was sold by the trustee, Britton.

The circuit court rendered judgment for the defendant, which was reversed by the court of appeals, and the defendant has appealed to this court. The court of appeals held that as the plaintiff took the trust deed without notice, actual or constructive, of the rights of the Florissant R. R. Co., to which the defendant suc-

ceeded, he was entitled to recover, and that the facts stated in the record did not bring the defendant within the rule laid down in *Provolt v. Railroad*, 57 Mo. 256, and *Baker v. Railroad*, 57 Mo. 265. In this opinion we fully concur; but as the case is to be retried, we think it proper to add a few observations upon the latter point.

It is very clear that none of the acts done by the railroad company upon the land sued for, prior to default in the payment of the debt, or interest, secured by the trust deed, called for any action on the part of the plaintiff, who was the beneficiary in said deed, even if he had known of them. Prior to the default of the mortgagor, the mortgagee had no right to forbid the mortgagor or his licensee from doing any work on the mortgaged premises, which did not impair the value of the land as security for the debt. If it clearly appeared, however, that after the trustee, by reason of default in the payment of any of the interest notes, became entitled to take possession of the land for the beneficiary, the defendant's road was in process of construction and not completed, and the plaintiff had knowledge that the defendant was building its road under a parol license, or an unrecorded deed given or made prior to the default, we think it would have been the duty of the plaintiff to have notified the defendant that there had been a default in the payment of the notes, and that he was entitled to the possession of the land, and forbade the further prosecution of the work. This duty results, as we think, from the nature of the estate of the mortgagee. A mortgage, in this State, is a mere security for the debt, and notwithstanding the legal title is nominally in the mortgagee, the mortgagor is still considered the owner and entitled to the possession until default. *Woods v. Hilderbrand*, 46 Mo. 284. Such being the law, we do not think it would be equitable to permit a mortgagee to lie by after the default of the mortgagor, and see a valuable and costly improvement erected upon the mortgaged premises, by a third party, in good faith, under a license from the owner of the land, making no objection whatever, and when the structure is completed, deprive such party of its enjoyment. In such case, we think the license of the owner should be held to be the license also of the mortgagee.

The judgment of the court of appeals will be affirmed, and the cause remanded to the circuit court for a new trial. All the judges concur.

THE HOUSTON AND T. C. R. R. Co.

v.

THOMAS M. SHIRLEY.

(54 *Texas Reports*, 125. December 17, 1890.)

Pending a suit begun by appellee against the Waco and N. W. Ry. Co., July 16, 1870, the Houston and Texas C. R. R. Co. entered into a contract with the former road to aid in its construction. For a debt thus contracted the Waco and N. W. R. R. Co. was sold under a deed of trust given to the Houston and T. C. R. R., and the latter road, at the sale in February, 1873, became the purchaser of the property and franchises of the Waco and N. W. R. R. Afterwards, in May, 1873, an act of the legislature was passed for the merger of the two roads, making the sold-out road a part of the purchasing road. Afterwards, in January, 1877, the Houston and T. C. R. R. was made a party defendant, charging that the contract between the roads was illegal, fraudulent and ultra vires, and seeking to make the purchasing road liable for the debts of the Waco and N. W. R. R. *Held*—

1. Ordinarily, a consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation; but this rule is restricted to voluntary consolidations.

2. The foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest on agreement, either express or implied.

3. The act of merger was not passed by the legislature, or accepted in contemplation of an agreement between the companies, but because the trust sale had divested the Waco and N. W. R. R. Co. of all its property and franchises, and that the purchaser, being a corporation, needed for that reason only, legislative sanction to authorize it to operate the road.

4. If the Houston and T. C. R. R. Co. exceeded its powers in acquiring the property, it was a consummated transaction and could be impeached, if at all, for that reason, by the state alone.

5. The purchasing road by its contract assumed only the liabilities created by the Waco and N. W. R. R. in the construction of its road after its first contract was made with the Houston and T. C. R. R. Co.

6. That the act of merger did not affect the rights of either stockholders or creditors.

7. That by accepting the conditions of the act of consolidation, the Houston and T. C. R. R. Co. did not subject itself to pay the liabilities of the sold-out road.

See original opinion for a charge of the court on the subject of exemplary damages, held erroneous. At common law, except in actions for breach of promise of marriage, the motives or conduct of the party breaking the contract cannot be made a ground for awarding exemplary damages. Opinions of an elementary writer* on this subject referred to in the opinion on motion for rehearing and disapproved.

The constitution of 1866 did not prevent the franchise of a railway company from being mortgaged and sold under a decree of foreclosure, or by a trustee empowered to sell.

* Field on Damages. p. 57.

The refusal of a witness to answer a material question should not be permitted by the officer taking depositions.

The question whether a deposition should be excluded because of the failure of a witness to answer a question, is to a large extent left to the discretion of the court; it should not be excluded for any casual omission to answer an unimportant question.

See conclusion of original opinion for a case where it was error to permit a deposition to be read, because of the failure of the deponent to answer questions.

APPEAL from McLellan. Tried below before the Hon. C. C. Alexander.

On the 19th day of July, A. D. 1869, the Waco Tap R. R. Co., afterwards called the Waco and Northwestern R. R. Co., entered into a written contract with the appellee, Thomas M. Shirley, whereby Shirley undertook to construct the railway for the company from Bremond to Waco. It was to be completed in two years. About April 1, 1870, the railroad company notified Shirley that he would no longer be recognized as contractor on the road.

On the 16th day of July, A. D. 1870, Shirley filed his suit against the Waco Tap R. R. Co. for damages occasioned by a breach of the contract, which he alleges was made by the railroad company.

At the fall term, A. D. 1878, of the district court of McLennan county, a trial was had, which resulted in the jury returning this verdict: "We, the jury, find for the plaintiff in the sum of eight thousand five hundred and nine dollars and forty-one cents, being principal and interest on reserved per cent and work actually done, and for actual damages in the sum of fifty-four thousand and one dollars and nine cents; also, for exemplary damages in the sum of thirty-seven thousand and five hundred dollars; and further, find that the mortgage be foreclosed against the Waco and Northwestern R. R. Co. and the Houston and Texas Central R. R. Co."

Judgment was rendered in accordance with the verdict foreclosing the mortgage on the railroad extending from Bremond to Waco, road-bed, right of way, superstructure, rights and properties and franchises thereof, for the payment of the sum of \$8,509.41; and for the other amounts found by the jury, a general judgment was entered against the Houston and Texas Central Ry. Co., to be enforced by execution in usual form.

After the termination of Shirley's connection with the Waco Tap R. R. Co. as contractor, on the 10th day of June, 1871, the Houston and Central Ry. Co. entered into a contract with the Waco Tap R. R. Co., then known as the Waco and Northwestern R. R. Co., whereby, for the considerations expressed in the contract, the Houston and Texas Central Ry. Co. undertook to build and construct, and did build, construct and complete the

railroad from Bremond to Waco for the Waco and Northwestern R. R. Co.

An inducement moving the Houston and Texas Central Ry. Co. to undertake the building of the railroad seems to have been the execution and delivery to it of a bond, payable January 1, 1873, for the sum of \$600,000, in gold, made by the Waco and Northwestern R. R. Co. The payment of this bond was secured by a deed in trust, whereby the Waco and Northwestern R. R. Co. conveyed to Peter W. Gray and Benj. A. Botts "all and singular the several tracts and parcels of land which now are, or may hereafter be, or constitute the site of the railway, turn-outs, side-tracks, depot grounds and appurtenances, and all lands which now are or may hereafter constitute and be a part of the road, and the rights of way thereof from the town of Bremond, where it connects with the road of the Houston and Texas Central Ry. Co., to the depot grounds in the city of Waco, on the east side of the Brazos river, and thence as authorized by the charter of the party of the first part (the Waco and Northwestern R. R. Co.), and also the cross ties and other superstructure work which has been or may hereafter be placed and built on the line of road aforesaid; and also all and singular the chartered rights, privileges and franchises of every kind granted to the party of the first part (the Waco and Northwestern R. R. Co.) by acts of the legislature of the state of Texas, which now are possessed by the party of the first part, or to which they may hereafter become entitled under said acts and the laws of Texas relating to railroads."

The Houston and Texas Central Ry. Co. completed the construction of the line of railroad from Bremond to Waco during the year 1872.

The bond for \$600,000 in gold matured January 1, 1873, and the Waco and Northwestern R. R. Co. made default in its payment.

A sale under the deed in trust was made by Gray and Botts, trustees.

It was admitted in the record, "that all said documents, to wit: said contract, supplemental contract, bond and deed in trust, were duly and legally executed, and that the sale under the deed in trust, made by Gray and Botts, was regular and in conformity with the said deed in trust. That said sale was made by the said trustees, Gray and Botts, on the 4th day of February, A. D. 1873, and that at said sale the Houston and Texas Central Ry. Co. became the purchaser of the property in said deed in trust mentioned, for the sum of four hundred thousand dollars, and the trustees thereupon executed a deed conveying all and singular the trust property to the Houston and Texas Central Ry. Co.

On the 24th day of May, 1873, the Houston and Texas Central

Ry. Co. procured the passage of an act of the legislature of the state of Texas, by which, so far as the legislature could lawfully effect it, the said W. & N. R. Co. was merged into the said H. & T. C. R. Co., and thereafter constituted a part of the same, there being no provision made in said act of merger for the debts of the said W. & N. R. Co.

On the 22d day of April, A. D. 1876, the Houston and Texas Central Ry. Co. was made a party to this suit, by an amended petition filed on that day, wherein the plaintiff Shirley averred "that all said acts and doings in and about said contracts, sale and purchase between said W. & N. R. Co. and said H. & T. C. R. Co. being illegal and fraudulent and ultra vires, therefore no title or right to the property of said W. & N. R. Co. passed to said H. & T. C. R. Co. thereby, and that said H. & T. C. R. Co. acquires its rights to hold and enjoy the rights and benefits of the property and franchise of said W. & N. R. Co. through said act of merger as aforesaid only, and by no other right or authority. And by virtue of said act of merger and consolidation of said W. & N. R. Co. into said H. & T. C. R. Co., the latter is bound to pay your petitioner all his claims, demand and damages, with interest thereon, and his proper costs in this behalf expended as hereinbefore set up, the same as said W. & N. R. Co. was bound and liable before said merger."

The Houston and Texas Central Ry. Co. pleaded—

1. A general demurrer.
2. The general denial.
3. The statute of limitations.
4. The manner by which it acquired the property of the Waco and Northwestern R. R. Co.
5. That the Houston and Texas Central Ry. Co. was a bona fide purchaser of all the property for value paid without notice, etc.
6. Several matters of estoppel on the part of plaintiff.
7. And adopted the allegations contained in the answer of its co-defendant, the Waco and Northwestern R. R. Co.

A motion for a new trial overruled, and defendant gave notice of appeal. This appeal was prosecuted by the Houston and Texas Central Ry. Co.

The charge of the court on the subject of exemplary damages was as follows:

"16. A private corporation is, like an individual, punishable by exemplary damages for wrongful acts done in a fraudulent, malicious or oppressive manner; but in order that it be held responsible, it must be shown that it authorized the act done, sanctioned it in the manner required for the performance of official acts afterward, with a knowledge of the facts, or that it was done by an authorized agent in the performance of an act authorized by the corporation.

"17. Malicious, fraudulent or oppressive acts done by an agent

of a corporation, done after the breach of a contract by the corporation, and not in pursuance of its instructions, cannot be considered as a basis for exemplary damages against a corporation from the manner of breaking a contract."

The acts complained of, from which it was claimed that a right to exemplary damages resulted, consisted of what it was claimed was an "intentional gross breach of a contract."

Exhaustive and able arguments for rehearing were filed by counsel for appellee, devoted chiefly to a discussion of the evidence. Their length precludes insertion.

Geo. Goldthwaite, for appellant.

R. R. Reeves, for appellee.

I. If the deed from Gray and Botts to the Houston and Texas Central Ry. Co. vested the title in said company to the property therein conveyed, the land grant from the state to the Waco Tap R. R. Co., and its existence as a corporation, and its corporate powers and franchises, did not pass to the Houston and Texas Central Ry. Co. by said deed, but were derived from the act of merger; and when the Houston and Texas Central Ry. Co. accepted the merger without providing for the liabilities of the W. & N. W. R. R. Co., it became liable thereby to the plaintiff for the damages claimed in his suit. Act of merger, May 24, 1873, Special Laws, p. 581; *Atkinson v. The Marietta and Cinn. R. R. Company*, 15 Ohio St., 21-35; *Chicago R. R. Co. v. Moffitt*, 75 Ill., 528; *Thompson v. Abbott, etc.*, 61 Mo., 176; *Eldridge v. Smith*, 34 Vt., 490, and other cases referred to under first assignment.

II. By accepting the acts of merger and its benefits, without providing for the payment of the liabilities of the Waco Tap and Northwestern R. R. Co., the Houston and Texas Central Ry. Co., as its successor and representative, became bound for all said liabilities in the same way that the Waco and Northwestern Ry. Co. was bound before the merger. *Waco Tap R. R. Co. v. Shirley*, 45 Tex., 325; *Gordon v. Jones*, 27 Tex., 620; *Hays v. The H. & G. N. R. R. Co.*, 46 Tex., 280; *Graham v. Roder*, 5 Tex., 149; *The H. & G. N. R. R. Co. v. Randall*, Supt. Ct. Texas, Law Journal, November 22, 1878, No. 18, p. 278; 50 Tex., 254. That a corporation may be guilty of such acts as to subject itself to exemplary damages, Const., art. 16, sec. 26; *Hall v. O'Malley*, 49 Tex., 73. As to exemplary damages, *Sedg. Meas. Dam.*, pp. 38, 39, 565, note; *Field on Dam.*, p. 66; *The New York and New Haven R. R. Co. v. Schuler, etc.*, 34 N. Y., 30; *Paine v. Lake Erie and Lou. R. R. Co.*, 31 Ind., 283; *Columbus, etc., R. R. Co. v. Powell*, 40 Ind., 37; 57 Ill., 528; 61 Mo., 176.

III. The verdict of the jury for the exemplary damages was for a sum less than that claimed by appellee in his petition, and was warranted by law and the facts in evidence, showing that the de-

Ry. Co. procured the passage of an act of the legislature of Texas, by which, so far as the legislature could effect it, the said W. & N. R. Co. was merged into & T. C. R. Co., and thereafter constituted a part thereof, there being no provision made in said act of merger of the said W. & N. R. Co.

On the 22d day of April, A. D. 1876, the Houston and Texas Central Ry. Co. was made a party to this suit, by petition filed on that day, wherein the plaintiff Shirley alleged all said acts and doings in and about said contract of purchase between said W. & N. R. Co. and said H. & T. C. R. Co. being illegal and fraudulent and ultra vires, and that the right to the property of said W. & N. R. Co. passed to the T. C. R. Co. thereby, and that said H. & T. C. R. Co. has the right to hold and enjoy the rights and benefits and franchise of said W. & N. R. Co. through the said act of merger and consolidation of the said W. & N. R. Co. into said H. & T. C. R. Co., the latter is bound to satisfy all his claims, demand and damages and his proper costs in this behalf expended by the said W. & N. R. Co. was before the merger."

The Houston and Texas Central Ry. Co. (

1. A general demurrer.
2. The general denial.
3. The statute of limitations.
4. The manner by which it acquired the property from the Northwestern R. R. Co.
5. That the Houston and Texas Central Ry. Co. is the purchaser of all the property for the said W. & N. R. Co.
6. Several matters of estoppel.
7. And adopted the allegations of the plaintiff, the Waco and Northwestern R. R. Co.

A motion for a new trial or for a judgment of appeal. This appeal was taken by the Houston and Texas Central Ry. Co.

The charge of the court was as follows:

"16. A private corporation is liable for exemplary damages for its tortious or oppressive manner of doing business, if it must be shown that the manner required for the recovery of such damages with a knowledge of the facts by the agent in the performance of the duty."

"17. Maliciously."

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fendant, the H. & T. C. R. R. Co., its officers and agents, by its authority, were guilty of such acts of malice, fraud and oppression in the breach of the contract with appellee, as to make it liable for said damages.

E. A. McKenney, also for appellee.

I. The franchise did not pass to appellant by the conveyance of Gray and Botta. 50 Tex., 552; 2 Redfield's American Ry. Cases, Summary of Editor, 690; 6 B. Mon., 1; Green's Brice's Ultra Vires, 802.

II. The franchise was a valuable right conferred on appellant by the state, at the expense of the W. & N. R. Co., and through it, its creditors. The franchise would have enabled the W. & N. R. Co. to acquire more property with which to satisfy its creditors, but the state, by consent of W. & N. R. Co., took away its existence, thereby affecting the creditors; therefore the state substituted appellant, with its consent, for W. & N. R. Co. The liability of the appellant necessarily follows, upon its acceptance of the merger, and the act of merger inevitably includes that liability. Act of merger, Special Laws, 1873, p. 581; Stephenson v. T. R. R. Co., 42 Tex., 162; Green's Brice's Ultra Vires, p. 545, par. III, IV; Green's Brice's Ultra Vires, p. 538, and p. 526 et seq.; Indianapolis, Cin. & L. R. v. Jones, 29 Ind., 465.

III. The act of merger is a complete immersion, or burial, of the W. and N. R. Co. into the body of appellant, through the consent to the prior conveyance and transfer of franchise. Then the debts and liabilities of the W. and N. R. Co. must follow the body wherever it goes. Act of merger, Special Laws, 1873, p. 581 (as the books do not show such another act of legislation—except, perhaps, 29 Indiana, 465—itself is the only authority in point).

IV. Every purported act of the W. and N. R. Co., of any kind, after merger, though in name of W. and N. R. Co., was, in fact, the act of appellant, through its directors.

GOULD, ASSOCIATE JUSTICE.—This suit was originally instituted against the Waco and N. W. R. R. Co., to recover certain sums alleged to be due for work done under a contract with the Waco Tap R. R. Co. to construct its road from its junction with the Houston and Texas Central Ry. to the city of Waco, and to recover damages, actual and exemplary, for an alleged breach of said contract. When formerly before this court on appeal by the Waco and N. W. R. R. Co., it was decided that under his contract Shirley had no equitable mortgage on the roadbed, etc., for any damages he might be entitled to for breach of contract, but that he had such equitable mortgage for sums due him under the contract and not paid. 45 Tex., 355. It was also decided that in estimating the damages sustained by plaintiff by the breach of the

contract his future profits under the contract thereby lost were to be taken into consideration.

After the case was remanded to the district court, the Houston and Texas Central Ry. Co. was made a party defendant, it being claimed that the Waco and N. W. Ry. Co. had been consolidated therewith and merged therein by an act of the legislature, May 24, 1873; that by reason thereof the Central enjoyed the property and franchise of the Waco road, and was bound to pay petitioner's demands, including damages and interest. There were other grounds on which it was sought to charge the H. and T. Central Ry. Co., but it is not material to state them.

The result of the trial this time was a verdict in the plaintiff's favor for \$8,509.41 due under the contract—for \$54,001.09 actual damages, and \$37,500 exemplary damages—and judgment was accordingly rendered foreclosing the equitable mortgage claimed for the sum just named, and awarding execution against the Houston and Texas Central for the amount of damages, actual and exemplary.

To the extent of the \$8,509.41, proved to be due and secured by mortgage, the judgment is not complained of, but all further liability on its part is denied by the appellant.

The act of May 24, 1873, is as follows:

"An act to provide for the merger of the Waco and Northwestern Ry. Co., with its properties, rights, privileges and franchises, in the Houston and Texas Central Ry. Co."

SEC. 1. Be it enacted, etc.: That the said Waco and Northwestern R. R. Co. is hereby merged in the Houston and Texas Central Ry. Co., and the said Waco and Northwestern R. R. is hereby made, to all intents and for every purpose in law, a part of the Houston and Texas Central Ry. And the Houston and Texas Central Ry. Co. is hereby authorized and empowered to operate, manage and control the said Waco and Northwestern R. R. in the same manner as every other part of the said Houston and Texas Central Ry.; and shall have the right to continue the construction of said railroad from the city of Waco in a northwesterly direction, in accordance with the terms of the charter of the said Waco and Northwestern R. R. Co.; and the said Houston and Texas Central Ry. Co. shall possess and enjoy all the properties, rights, franchises and privileges belonging and heretofore granted to the said Waco and Northwestern R. R. Co.

SEC. 2. This act of consolidation is passed, and shall become operative, on condition that said consolidated road shall not, in either of its branches, be sold, leased or rented to, or consolidated with, any other parallel, competing or converging railroad; and that said company shall not purchase, own or control any such parallel, competing or converging road; and upon the still further condition

that the portion of said Northwestern Railroad not yet built, if built at all by said company, shall be constructed and put in operation within the time required by the charter of said road; and should the general line of the portion of said road not yet built, pass within five miles of any established county seat, then said road shall run to said county seat, and said company shall establish and keep a depot for freight and passengers within one-half mile of the business portion of said town, on condition that the right of way through said town, and sufficient ground, not less than fifteen acres, for switches, turn-outs, and such building as may be necessary and proper, shall be furnished to said company free of charge; provided, that said company shall not be compelled to construct said road within one-half mile of any county seat where, from natural obstacles, it is impracticable to do so; but in such case said road shall run, and a depot be established, as near said town as such natural obstacles will admit; and should the line of said road be definitely located through any county before the permanent location of the county seat thereof, then it shall not be necessary for said road to be so varied from its line as to run within one-half mile of said town.

Sec. 3. This act shall take effect and become operative upon the acceptance by said company of the conditions herein stated.

Approved May 24, 1873.

On the subject of the rights and liabilities of the appellant, the court instructed the jury as follows:

"20. That the papers and documents in evidence show a valid title in the Central Ry. Co. to the existing property therein conveyed, so far as the plaintiff is concerned, and which the plaintiff has no right in this action to question on account of want of authority to convey and receive, and there is no evidence of allegations of fraud in the conveyances, and it is not deemed necessary or proper to submit the issue of estoppel raised by the pleadings, in view of the law and the evidence.

"21. But you are charged, that the act of the legislature in evidence before you, merging the Waco and Northwestern R. R. Co. in the Houston and Texas Central Ry. Co., and the acceptance of said act and its benefits by said last named corporation (which is not controverted), the Houston and Texas Central Ry. Co. became liable for all obligations of the Waco Tap, and its nominal successor, the Waco and Northwestern R. R. Co., whether in debt or damages; and in forming your verdict, if for plaintiff, you will find your verdict in terms against the defendants, the Waco and Northwestern R. R. Co. and the Houston and Texas Central Ry. Co."

The papers and documents referred to show that in October, 1871, pending this suit, the Houston and Texas Central entered into an original and supplementary agreement with the Waco and Northwestern R. R. Co., to aid in the construction and completion

of its road, under which the Waco road became largely indebted to the Central, said indebtedness being secured by a deed of trust, including its road-bed, right of way, depot grounds and appurtenances, etc., and all its "chartered rights, privileges and franchises of every kind, granted to the party of the first part by acts of the legislature of the state of Texas, which are now possessed by the party of the first part, or to which they may hereafter become entitled under said acts and the laws of Texas relating to railroads." A sale was had under the deed of trust, on February 4, 1873, at which sale the Central became the purchaser, and received from the trustees a conveyance of the property and franchises specified in the deed of trust. It was after this sale and purchase that the special act of the legislature of May 24, 1873, was passed.

Ordinarily the consolidation of two railroad corporations is accomplished by agreement under legislative authority; the terms of consolidation providing for the rights of both creditors and stockholders of the original corporations. Says a recent text writer: "The consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation." Jones R. R. Securities, sec. 415. Evidently a voluntary consolidation is intended. An examination of the authorities cited by the author, as well as those cited by appellee in support of the charge of the court, will show that they are all cases of consolidation by agreement under legislative sanction. Evidently such a consolidation cannot be accomplished in disregard of the rights of creditors or stockholders, and accordingly either in the statute authorizing or in the agreement consummating such consolidation, stipulations are inserted for the protection of those rights. And even if neither statute nor agreement makes mention of creditors, the consolidated corporation is held to have assumed the liabilities of its constituents. Pierce on Am. R. R. Law, p. 503, citing 1 Am. Rail. Cas., 96, notes.

But clearly the purchaser of property at a sale under an execution or deed of trust assumes no personal liability for the debts of the former owner; and if by such a purchase the chartered rights and corporate existence and privileges of a corporation pass under the control of the purchaser, it still does not follow that its liabilities also attach to him. *Vilas v. Milwaukee, etc., Ry. Co.*, 17 Wis., 513; *Smith v. Chicago and N. W. Ry. Co.*, 18 Wis., 22; *Morgan Co. et al. v. Thomas et al.*, 76 Ill., 147.

The laws of this state allow a railroad corporation to encumber by deed of trust for the payment of its debts and legal liabilities, its "road-bed, track, franchise and chartered rights and privileges," to be deemed an entire thing and to be sold as such; and "the purchaser or purchasers at such sale and their associates shall be

deemed and taken to be the true owners of said charter, and incorporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same measure and to the same extent as if they were the original corporation of said company; and shall have power to construct, complete, equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of the state." Pasch. Dig., art. 4912; R. C., art. 4260.

It is provided that such sale shall not pass to the purchaser any right to recover of "former stockholders any sums which may remain due upon their subscriptions of stock, but said stockholders shall continue liable to pay the same in discharge and liquidation of the debts due by the sold-out company." The directors of the sold-out company at the time of sale are made "trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands. And no suit pending for or against any railroad company at the time that the sale may be made of its road-bed, track, franchise and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company." Pasch. Dig., arts. 4915, 4916; R. C., 4262-5.

The plain intent of the statute is to transfer the road-bed, track, franchise and chartered rights entire to the purchaser and associates, upon their adopting the form of organization prescribed in the charter and complying with its other requirements; and to remit creditors unsecured by lien to their remedy against such assets as pass to the trustees of the sold-out company.

Under this statute it is believed that a number of railroads in this state have been sold out and purchased by individuals, who have proceeded to organize and manage the corporation under the original charter. *Galveston R. R. v. Cowdrey*, 11 Wall., 459-474. Not only the road-bed and other mortgaged property, but the franchise to operate a road and the very corporate existence of the sold-out railroad passes to the new organization by virtue of the statute. Ordinarily such purchaser and associates need no further legislation. But in this case the secured creditor, itself a railroad corporation, became the purchaser. The statute does not in terms provide for a purchase by another railroad or corporation. The powers of corporations are strictly limited to those granted in their charters or by-law. If the charter of the Houston and Texas Cen-

tral was not comprehensive enough to authorize it to operate a railroad from Bremond to Waco, it might well hesitate to attempt to organize under the charter of the sold-out railroad, as an individual purchaser might have done. In cases of parallel or competing roads, any species of consolidation is forbidden by the present constitution (art. X, secs. 5, 6); and the consolidation of different railroads, though not competing, does not appear to have been contemplated by the statute. Hence, before undertaking to operate the Waco and N. W. R. R., it was but a prudent precaution in the Central to apply for and obtain legislative sanction. Holding the property purchased free from the claims of creditors and stockholders of the Waco and N. W. R. R. Co., we would reasonably expect that it would seek to obtain the passage of an act imposing no such burden. Such seems to be the purport of the act passed, for, whilst the Waco and N. W. R. R. Co. is merged in the Central and made part of it, and the Central is empowered to construct and operate said road as its own, and to possess all the properties, rights, franchises and privileges "belonging and heretofore granted" to the Waco and N. W. R. R. Co., we find no stipulations whatever recognizing or protecting any rights in stockholders or creditors. Certain conditions are imposed, on the acceptance of which by the company the act takes effect; but these conditions do not relate to either stockholders or creditors. No assent of the Waco and N. W. R. R. Co. is provided for. The act is neither valid nor intelligible unless read in the light of the occurrences which preceded and called for its passage. How could the legislature merge the Waco and N. W. R. R. Co. into the Central, regardless of the consent of the former and of the rights of stockholders? Clearly, the legislature assumed that the purchase under the deed of trust had consummated all that the act undertook to do, provided only that the purchase by a corporation received legislative sanction.

If there were effects or rights of the Waco and N. W. R. R. Co. not included in the deed of trust and not transferred to the Central before the act was passed, our opinion is that the act was inoperative to effect such transfer, without the assent of the first-named corporation. But in regard to all the property and rights so included, the Central, being already the equitable owner, was by the act vested with full ownership, and was empowered to operate the road under its own name and charter. In accepting the conditions of the act, our opinion is that the Houston and Texas Central R. R. Co. did not assume the liabilities of the Waco and N. W. R. R. Co., either to its stockholders or creditors.

On the subject of exemplary damages the court charged as follows:

"15. A mere breach of the contract on the part of the company will not authorize a verdict for exemplary or punitive damages; but if there was a breach of the contract by the corpora-

tion, and there was an act done by it, and such breach was done and made with a fraudulent intention to deprive Shirley of his legal rights, or with a malicious intent to oppress him, you may find a verdict for plaintiff for exemplary damages in any sum in your discretion, not exceeding the amount claimed by plaintiff as exemplary damages. If there was such a breach of the contract as entitles the plaintiff to the recovery of exemplary damages, under this charge his right to a verdict for the same is not impaired, although he may have suffered no actual damage such as mentioned in charges number ten and eleven."

The court rightly treated the action as one for breach of contract. No damages were claimed or recovered for a tortious conversion of plaintiff's property. The recovery sought and obtained was of sums due under the contract, of actual damages for the breach of contract, and of exemplary damages for such breach, on the ground that it was committed with a fraudulent and malicious intent to oppress.

Appellant claims that exemplary damages for a breach of contract is without precedent. Certainly the cases from this court cited by appellee constitute no such precedent. In *Graham v. Roder*, the gist of the action was deceit and fraud in professing to sell that which had no existence. 5 Tex., 147. *Gordon v. Jones* was an action for the tortious conversion of property. 27 Tex. 620. None of the other cases cited from this state were for breach of contract. At common law where the action is on the contract, the motives or conduct of the party breaking the contract cannot be considered in damages, except in actions for breach of promise of marriage. *Mayne on Law of Damages*, p. 10; *Wood's Mayne on Damages*, sec. 45; *Sedgwick on Damages*, 6th ed., 246 (208); *Field on Damages*, sec. 53. Mr. Sedgwick seems to think that this rule grows out of the forms of action at common law, and that the rule might be otherwise when there were no such forms. The reason of the rule that confines the recovery in suits on contract to actual damages is believed to still prevail, although we have no forms of action. If, in ordinary litigation on contracts, issues as to motives and exemplary damages be allowed, the result would be greatly to increase the intricacy and uncertainty of such litigation.

The exclusion of such issues in suits on contract may be justified on the policy of limiting the uncertainties and asperities attending litigation of such issues, to that class of cases in which the nature of the wrong complained of renders those issues and evils to some extent unavoidable. It is to be remarked that our statute, where a suit is founded on a certain demand, does not permit the defendant to set off unliquidated or uncertain damages. *Pasch. Dig.*, art. 3447. At all events, the allowance of exemplary damages in suits

on contract is not supported by authority, and the innovation is one which we are not prepared to make.

On the trial appellant objected orally to the depositions of Brown and voice, filed on the day the trial commenced, that they had each failed to answer certain cross interrogatories propounded to them, or had answered them evasively. The court in signing the bill of exceptions explains that the defendants were informed that the court would entertain objections to particular interrogatories, the crosses to which had not been properly answered. The authorities are that the omission to answer, or the refusal to answer, is fatal to the entire deposition. *Ketland v. Bissett*, 1 Wash. C. C., 144; *Winthrop v. Ins. Co.*, 2 Wash. C. C., 7; *Kimball & Rowe v. Davis et al.*, 19 Wend., 437; *Smith v. Griffith*, 3 Hill, 334.

Our opinion is that the objection, if well founded, was fatal to the entire deposition, and we are unable to see that there was such an amount of other testimony to the same effect as to show that the erroneous admission was an immaterial error.

The judgment is reversed and the cause remanded.

Reversed and remanded.

[Opinion delivered January 16, 1880.]

ON MOTION FOR REHEARING.

GOULD, ASSOCIATE JUSTICE.—In disposing of the motion for rehearing, it is proposed to do little more than to state our conclusions, on what we regard as the material points or questions raised in its support. The want of time forbids an attempt to discuss all of the legal positions assumed by counsel for appellee, each in elaborate briefs and printed arguments, characterized by great zeal, industry and ability.

The point is made that those sections of the statute referred to in the opinion as authorizing a railroad company to mortgage its franchise, were repealed by the constitution of 1866. Art. 7, sec. 6; Pasch. Dig., p. 943. In the original printed argument of counsel for appellant, filed December 5, 1879, this statute was relied on and cited at length, and it is not remembered that counsel for appellee in their oral arguments asserted its repeal. After the control of the state government was assumed by the military, under the reconstruction laws of the United States, and from that time down to its incorporation into the Revised Code, there is certainly some reason to believe that this statute was generally regarded, and often acted on, as in force, and to claim that it has repeatedly been treated as in force by the legislature and by this court. Rev. Code, art. 4259 et seq.; 2 Pasch. Dig., arts. 7387-9; *Scogin v. Perry*, 32 Tex., 21; *Good v. Sherman*, 37 Tex.,

660; *Witherspoon v. Tex. and Pac. R. R. Co.*, 48 Tex., 309; *Tyler Tap R. R. Co. v. Driscoll*, 52 Tex. 17; *R. R. Co. v. Henning*, 25 Tex., 466. But whether the statute was repealed and so remained, or whether, on the other hand, it should be treated as having been in force after the fall of 1867, is not material to be decided in this case; for in either event, we are of opinion that the power to mortgage the franchise was otherwise sufficiently recognized by the state. In the same sentence of the constitution of 1866 which repeals the act of December, 1857, and immediately following the repealing clause, we find the following: "And the franchise corporate privileges of any incorporate company shall not be sold under judgments, except for the foreclosure of mortgages or liens created in the manner prescribed by law." In a previous part of the same section the state was secured "by a first lien or mortgage upon the road, rolling stock, depots and franchises of the corporation whose bonds may be guaranteed." We think that these clauses show that it was the intention of the constitution of 1866 to permit the franchise of a railroad company to be mortgaged, and to be sold under a decree of foreclosure, or by a trustee empowered to sell.

The original opinion proceeds on the idea that the foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations, must rest on agreement, either express or implied. Proceeding on this basis, the court held, in substance, that the act of merger was not passed or accepted in contemplation of any agreement between the two companies, made or to be made, but in contemplation of the fact that the trust sale had divested the Waco and N. R. R. of its roadbed, mortgaged property and franchise, and that the purchaser, being a corporation, needed for that reason, and for that reason only, legislative sanction to authorize it to operate the road. The writer of the opinion may not have been happy in expressing the nature of the rights acquired, or supposed by the legislature and the railroad companies to have been acquired, by the Central through its purchase; but it is believed that, fairly construed, the substance of the opinion is as above stated.

It is urged that the original contracts and the trust sale and purchase were all *ultra vires* and void, and it seems to be argued that the legislature in passing, and the Central in accepting, the act, must be presumed to have treated all these proceedings as nullities. It is replied, and the position seems to us sound, and supported by the authorities cited by counsel, that though the Central had exceeded its powers in acquiring property, it was a consummated transaction, subject only to be impeached for that reason by the state. But a further reply is, that at the time the act was passed the Central appears to have been in undisputed possession under its contracts and purchase, and there is nothing to

indicate that it was treated by the legislature as having acquired no rights thereby. In one instance, at least, the same legislature treated the purchase of a railway at sale and foreclosure of mortgage, by another railway corporation, not as a nullity, but as making the latter the "owner" of the former, and reciting these facts in the preamble, proceeded to enact that the former railroad is "declared to be, to all intents and purposes in law, part of" the latter. See act of May 8, 1873, Special Laws. It is impossible to understand how the legislature could have passed the act, looking upon the purchase as conferring no rights, either because of the ultra vires nature of the contracts and purchase, or because the contracts were tainted with fraud, or were entered into in anticipation of the absorption of the Waco and N. R. R. by the Central.

It is claimed that the Central controlled the Waco and N. R. R. Company, owning over nine tenths of its stock, and a majority of the directors of the latter being directors of the Central, and that the act of merger was passed, looking upon the application of the Central as equivalent to the assent of the other Company. We think the record shows that the act was not passed in contemplation of any agreement fixing terms of consolidation, and it is therefore not important to inquire whether the Central was in a position to force the assent of those stockholders not interested in the Central. Counsel have made no suggestion how these stockholders were to be disposed of, under their view of the act of merger. We think the reasonable conclusion is that their rights, after the sale, were regarded as valueless, though we certainly do not intend to say that the land donation of the state was or was not embraced in the deed of trust, or that in fact the stockholders had nothing left. An insuperable objection to construing the act of merger as attempting to vest the property of one company in another, is the want of power in the legislature to do this. If the Central be estopped from denying the constitutionality of the act, we still think it highly improbable that the legislature intended to affect property rights by the act.

It is claimed that the original and supplementary contracts show an agreement on the part of the Central to pay off all of the existing liabilities of the Waco and N. R. R. That subject received the careful consideration of the court on the original hearing, although not embodied in the opinion, and our conclusion then was and now is that the Central, by its contract, assumed only the "liabilities created by the Waco and N. R. R. in the construction of its road after the first contract was made with the Central." It is very possible that the Central thought Shirley's pending suit was groundless and would result in nothing; but still it does not appear that by its contracts, or by the acceptance of the act of merger, it assumed to pay him. Upon the whole, looking at all the surroundings, we are still of opinion that the act was passed to

give the assent of the state to the purchase made by the Central, and to enlarge its corporate rights so as to enable it to operate the Waco and N. R. R.; that the act was not designed to affect, and did not affect, the rights of either stockholders or creditors; that as to creditors, it neither took away any assets from their reach, nor placed new assets within their reach; and that by accepting the conditions of the act the Central did not subject itself to the liabilities of the Waco and N. R. R. On this branch of the case we will only add that no question has been before us as to the rights of a judgment creditor of the latter road, and that we are not aware of having said anything which would preclude such a creditor from any remedy he may be entitled to, or embarrass him in seeking that remedy.

II. On the subject of exemplary damages because of alleged malice in the breach of a contract, we adhere to the views expressed in the opinion. The charge of the court submitted to the jury no issue as to whether or not a tort had been committed, or as to the amount of actual damages to the "character, reputation and standing among business men" of plaintiff from any alleged tortious act of defendant, established to their satisfaction, but allowed them to give exemplary damages, if there was a breach of the contract done and made with a fraudulent or malicious intent. The expression in the charge about an act done by the corporation, is indefinite and amounts to nothing. The question presented to us was on this charge. Was it right? Or, was it wrong? We answered that it was wrong, and notwithstanding the authorities referred to by counsel, we are still of that opinion. The cases cited as to the enlarged measure of actual damages, for a fraudulent failure to comply with a contract to convey land, certainly do not authorize exemplary damages. Cases are also cited where exemplary damages have been allowed in suits against carriers for breach of contract; but evidently on the facts, the action might have sounded in tort, for what amounted to a tort was alleged. With due respect for the elementary authors cited, we are unwilling to follow them in this matter. One of them has declared the allowance of exemplary damages to be a "departure from the true principles of the law of damages, and of public policy." Field on Damages, p. 28, note. As we agree with him in this opinion, we are not prepared to go beyond the authorities, and to lead the way in allowing such damages for breaches of contract.

But counsel assert the right to sue in one action for a breach of contract, and for damages for a tort, where both claims grow out of the same transaction, and are so connected that they may conveniently and appropriately be litigated together. Thus qualified, this proposition is believed to be in accordance with the decisions in this state. But we regard the petition of plaintiff, in so far as it attempts to allege a tort and to recover damages there-

for in addition to damages for a breach of contract, as substantially seeking a double recovery for the same wrong. The real purport of the petition was to claim damages for breach of contract, including profits lost by the breach, and to claim also exemplary damages because of alleged malice in committing the breach.

III. In regard to the depositions of Brown and Boyce, we adhere to our opinion that they should have been excluded. They were giving their opinion as contractors and builders, of the cost of clearing, track laying and other work, and it was the right of defendant to have them answer interrogatories calculated to show the extent of their experience and knowledge, and the value of their opinions or estimates. The refusal to answer a material question should not be allowed by the officer taking the depositions, and the mere neglect to answer may prove as injurious to the party questioning.

It is not believed that the authorities require the exclusion of depositions in all cases where the witness has failed to answer every question. Much must be left to the discretion of the court. The rule should not be allowed to be presented to obstruct or retard trials, or to exclude depositions because of a manifest casual failure to answer some unimportant question.

The motion for rehearing is overruled.

GIBBES

v.

GREENVILLE AND COLUMBIA R. R. Co.

STATE, EX. REL. ATTORNEY-GENERAL,

v.

SAME.

(18 *Shand*. [S. C.] 228. March 24, 1880.)

A mortgage of railroad property was made to one, his heirs and assigns, as trustee for bondholders. Under proceedings for foreclosure, the mortgagee being dead, another trustee was substituted and decree of foreclosure rendered. Afterward, a petition was filed by a son of the original mortgagee claiming to be his heir-at-law, and praying to be made a party. Petition dismissed.

Doubted whether ordinances of the convention of 1868 had any legal effect upon then existing statutes.

Private rights vesting during the war between the states are protected by the constitution of the United States, and cannot be impaired by an ordinance of the state constitutional convention of 1868.

"An act to promote the consolidation of the Greenville and Columbia R. R. Co." provided in its 4th section for a waiver of the lien of the

state on the Blue Ridge R. R. property, and in its 5th section, for a like waiver of lien upon the property of the Greenville and Columbia R. R. property, and in its 7th section, for the endorsement by the consolidated companies of the bonds of the two companies consolidating. The two companies not having consolidated, *held*, that the act never took effect.

Where an act of the general assembly provided that all the property of a railroad company should stand pledged and mortgaged to the state for the payment of certain bonds issued by such company, and guaranteed by the state, such provision constituted a statutory lien for the benefit of the bondholders as well as the state, which no subsequent statute could postpone. *Hand v. R. R. Co.*, (1,) 12 S. C. 314, followed and approved.

Where the state guaranteed the bonds of a company, issued in exchange for outstanding mortgage bonds, under a statute which provided that the state should take and retain possession of the bonds so surrendered in exchange as "security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired; all of the mortgage bonds not having been surrendered or exchanged, *held*, that the state could assert the lien of the mortgage bonds so held by her, together with the coupons thereto attached, as of equal rank with the mortgage bonds not exchanged.

A statute authorizing the guarantee by the state of certain bonds of a railroad company to be secured by a statutory lien, was passed in 1861, and the bonds issued and guaranteed under the authority of this act bore the caption "Confederate States of America." In 1866, another act was passed which extended the operation of the act of 1861, and authorized the issue of new bonds in exchange for the C. S. A. bonds, also certificates of indebtedness to pay interest past due on the C. S. A. bonds, and bonds for other indebtedness, all of which were to be in like manner guaranteed. *Held*, that the C. S. A. bonds, not surrendered, were of superior rank to the bonds issued under the act of 1866, but those issued under act of 1866, in exchange for bonds surrendered, could claim a lien only under the latter act, and stood upon the same footing with all other bonds issued under the act of 1866. *Hand v. Railroad Company*, (5,) 12 S. C. 315 approved.

Under an act of the legislature passed in 1869, certificates of indebtedness were authorized to be issued by a railroad company for funding interest due upon its bonds which were secured by a lien under an act of 1866, and which lien was extended by the later act to cover these certificates of indebtedness. *Held*, that this was a mere substitution, and not a payment, and that the lien of these certificates was superior to that of a mortgage executed between 1866 and 1869.

BEFORE PRESSLEY, J., Richland, October, 1878.

The facts of the case are fully stated in the Circuit decree, and again in the opinion of the court. The Circuit decree is as follows:

The reports of the referee and the acts of assembly furnish the facts of these cases, as follows, to wit:

In January, 1854, the defendant mortgaged all its property to C. M. Furman, trustee, to secure \$800,000 of its bonds, payable in 1862, 1863 and 1864. Before they became due, it had incurred \$100,000 other debts; and to enable it to provide for these debts and the mortgage bonds, then almost due, the state, by act of 1861, agreed to guarantee \$900,000 new bonds of defendant, and further provided that the first mortgage bonds, which should be exchanged for guaranteed bonds, should stand as security to the state, and

thereby give it the lien under the first mortgage until all these bonds should be retired.

By said act the state's guarantee was to be endorsed on \$250,000 of the new bonds before any of the old were taken up, and thereafter the disparity was to increase so that only \$400,000 of the old bonds would be held by the state, when her guarantee would be on \$700,000 of the new bonds.

This proposed guarantee was made during the war, up to \$700,000, and the guaranteed bonds then issued were entitled "Confederate States of America."

According to the act, they constituted a mortgage to the state on the whole estate of the defendant for its faithful performance of its contract "and the payment of such obligation." The defendant was also required, after the three years, to set apart two per cent on the amount of the guaranteed bonds for retiring the same.

This was not done, nor did defendant pay, during the war, the interest on either the first mortgage bonds or those guaranteed.

In 1866, the said interest being still unpaid, and the defendant owing \$600,000 other debts, besides interest, the state passed an act which authorized its guarantee on \$1,500,000 new bonds and certificates of indebtedness of defendant, which were to be applied as follows, to wit:

\$700,000 to be exchanged for that amount of guaranteed bonds, which have been issued during the war, and entitled "Confederate States of America;" \$200,000 to be exchanged for that amount of first mortgage bonds then outstanding; \$350,000 to the payment of interest on the guaranteed and first mortgage bonds, and \$250,000 to compromising the remaining debts of defendant at one-third thereof. To the whole of the \$1,500,000 bonds and certificates guaranteed under this act, the mortgage of the act of 1861 was equally extended.

The report of the referee shows that holders of \$241,000 of first bonds did not exchange them for those authorized by this act; only \$200,000 of these should have remained outstanding when the \$900,000 guarantee of the state was complete; but of the guaranteed bonds which were executed, \$35,000 yet remain unused in the hands of the comptroller-general, and thus the failure to comply with the terms of the act is reduced to \$6000 outstanding first mortgage bonds, which are contested by defendant without sufficient proof.

As to how much of the \$700,000 guaranteed under the act of 1861 was exchanged for those authorized by act of 1866, there is no information in the referee's report or the evidence.

The defendant being again unable to pay interest on its guaranteed and first mortgage bonds for the six months ending July 1st, 1868, the state, by act of February, 1869, authorized its guarantee on \$50,000 certificates of indebtedness, to be used for funding said

interest, and to these certificates the statutory lien of 1866 was extended. In May, 1867, the defendant executed to C. D. Melton, trustee, a second mortgage, to secure \$1,500,000 bonds and certificates of indebtedness thereafter to be issued, and to bear date as issued.

There is no proof before me as to the date of any of said bonds, but it is quite certain that it was after the act of March, 1871, which, to promote the consolidation of the defendant with the Blue Ridge Rail [road] Company, purported to make all statutory and other liens, except existing mortgage encumbrances, subsequent to the said second mortgage.

The 7th section of this act requires that the bonds to be issued by the defendants under its second mortgage shall be endorsed by the proposed consolidated company, but the consolidation was not made, and consequently such of said bonds as were issued are without said endorsement.

Upon the facts above stated, I hold:

1. That the statutory liens, under the acts of 1861, 1866 and 1869, were securities for payment of the bonds therein authorized, not mere indemnities to the state, and therefore it had no right to waive them in favor of the second mortgage.

2. That said waivers, if lawful, never took effect, because the endorsement of the second mortgage bonds by the consolidated company was a condition precedent, and not complied with.

3. That the debts due for necessary repairs, materials and labor for operating the road, pending the litigation in these cases, and which produced income, applied to the payment of interest on the guaranteed and first mortgage bonds, are first to be paid out of the property of defendant.

4. After payment of said debts, the first mortgage bonds outstanding, and those held by the state, with all unpaid interest thereon, are the first lien on said property.

5. That the portion of the state under this mortgage is for its own indemnity, and is, therefore, equitable assets applicable pro rata to all the bonds it has guaranteed under the acts of 1861, 1866 and 1869.

6. That such of the bonds, if any, guaranteed under act of 1861, as were not exchanged under act of 1866, are the next lien on said property.

7. That the exchange of bonds guaranteed under act of 1861 for those of the act of 1866, was in acceptance of all the provisions of the latter act, and all the bonds issued thereunder have equal rights, and rank next to those, if any, under act of 1861, which were not exchanged; and after those of 1866, the bonds issued under act of 1869 rank next.

8. The second mortgage bonds which have been reported as issued, or which may hereafter be shown to have been lawfully

issued, are entitled to the surplus assets after payment of those secured by first mortgage and the said statutory liens.

It is adjudged and decreed, that the foregoing conclusions of law and fact do stand as the judgment of this court. Further, that all orders heretofore made by me, at chambers, and which in my order appointing the receiver, were reserved for this decree, do stand confirmed as part of the same.

It is further ordered, that these cases be referred to the master to take the testimony and report what debts for labor, materials and repairs, not heretofore ordered to be paid, are entitled to payment according to this decree.

Also, what first mortgage bonds are held as indemnity by the state, and the amount of interest due and unpaid thereon.

Also, what bonds guaranteed under act of 1861 were not exchanged for those under act of 1866.

Also, what amount of guaranteed bond were issued and are now outstanding under the latter act, and what under act of 1869.

Also, what second mortgage bonds, not heretofore proved, are entitled to share in the surplus.

The said master is hereby authorized to apply at chambers for leave to advertise all claimants herein provided for to present and prove their claims, and for such further orders as may be necessary to effect the purposes of this reference.

From this decree appeals were taken by H. H. De Leon, the trustee under the first mortgage, by W. A. Clark, trustee, under the second mortgage, by bondholders under act of 1861, and by B. B. Furman. The grounds of their appeal are fully considered in the opinion of the court.

Messrs. J. N. Nathans and A. G. McGrath, for H. H. De Leon, trustee.

Under the act of 1866, the state waived or relinquished the lien under the mortgage reserved to it in the first section of the act of 1861. The state had full control of this mortgage lien, which was wholly for the indemnity of the state. The statutory mortgage to secure the guaranteed bonds enured to the holders of such bonds. The legislature, in 1866, did not doubt the validity of the bonds of 1861, because of their date or caption; the doubt was as to the validity of the legislature which passed the act. A change of circumstances made proper a change in the act giving state assistance. Some things were omitted, others added. The legislature then thought a re-enactment necessary, and what they did not re-enact they intended to dispense with. The act of 1866 expresses, in itself, a clear intention that it should be a substitute for the act of 1861. See, too, ordinances of convention. Gen. Stat. LX. The act of 1869, by re-enacting act of 1866 only, treats it as a substitute for act of 1861. And yet the rights given under act of 1861 were preserved in act of 1866 in priority to other liens there created. 22 Cal. 414; 21 Wis. 370.

If the lien under the first mortgage of this company reserved to the state in the act of 1861, is a subsisting indemnity for the protection of the state against liability as guarantor on the bonds of the company, then such indemnity is limited to the amount of principal and interest due on bonds guaranteed by the state under the act of 1861, for which guarantee said indemnity was given, or to the amount of principal and interest due on bonds substituted for said original bonds under the act of 1866. An indemnity held by a guarantor is limited to protecting him against liability. 1 Jones on Mort., §§ 380, 384; 15 Gray, 521.

If the mortgage retired under the act of 1861, and in possession of the state, are a subsisting security for its indemnity against liability as guarantor, and entitled to share ratably with similar bonds outstanding in the proceeds of the property covered by the mortgage, then interest upon the bonds so held as indemnity, can only be claimed from the time the company suspended payment of interest on the guaranteed bonds for which said bonds were exchanged. 21 Wall. 622.

Messrs. Melton & Wingate, for W. A. Clark, trustee.

The first and second conclusions of law present the question, whether the act of 1871 was effectual to postpone the lien held by the state, so as to give priority to the second mortgage; and this will be conceded, unless it appears (1.) That the liens were not merely an indemnity to the state, but operated as security for the payment of the bonds to the holder; or, (2.) That the provision of the seventh section requiring the consolidated company to endorse the bonds then "held" by the two companies, was a condition precedent upon which the waiver depended.

I. The order of the propositions being inverted, we inquire whether there was a condition precedent. What bond were then held? There is no proof of any being held by either company. The purpose of the act was to promote the consolidation of the companies. The waiver was to enable the companies to secure this end, and must have preceded the consolidation. A condition precedent is one which must be performed before the thing to be obtained can be effectuated. It is usually imported by words clearly mandatory—by proviso, by limitation of time, by negative terms, or by language denoting an intention to make it essential to the thing in view, and clearly to suspend the attainment of this thing until the requirement be performed. But the requirement here is wholly independent of other provisions, and is purely directory. Bouvier's L. Dict.; Cooley on Const. L. 74, 84; Potter's Dwar. 220, et seq., and notes 27-29; Sedg. on Stat. & Const. L. 369, et seq.

II. Did the state have the right to waive her liens in favor of the second mortgage? This will affirmatively appear unless the acts of 1861 and 1866, creating and preserving the liens in question, are of such effect as to bind subsequent legislatures, and to

this extent limit the exercise of the sovereign power of the state. Such limitations are not favored. Bl. Com. 90, Const. U. S., Art. I., § 10, applies to contracts made by a state, but the presumption is that the state was making laws, not contracts, unless the contrary plainly appears. If there is no contract in the acts of 1861 and 1866, between the state and the bondholders, then the validity of the act of 1871 must be conceded. The aid granted here had been before extended to other railroads. It could not have been within the contemplation of the parties to extend the lien which it was the object of the act to remove. Public credit was then the highest security known to the commercial world. To this pledge alone the bondholder then looked; the doubt is an after-thought. The lien to the state as indemnity against its guarantee, was wholly independent of the contract between the company and the bondholders, debtor and creditor. The debt existed first; the lien was afterwards created. 18 Ohio (Gris.), 35; 29 Conn. 25. The right asserted in behalf of the guaranteed bondholder to a participation in the benefit of these liens, does not arise out of express contract. On the contrary, it is asserted as a right founded upon an equitable principle, which, as it is said, gives to the creditor the benefit of any security held by the surety for his indemnity and for the discharge of the debt. This principle, established by a long current of decisions, is conceded, but it remains to be considered whether it partakes, to any extent, of the nature of the contract, so as to vest in the guaranteed bondholder a right beyond the power of legislative control; or, as between parties of any character, a right which attaches to the security in the first instance, in such a way as to place it beyond the control of the parties to the contract; that is to say, the principal debtor and his surety.

This principle has been often referred to the same considerations of equity which have given rise to the doctrines of subrogation and of contribution. In a sense this is true; but they are not identical in their operation and effects. Indeed, it is rather the converse of subrogation, and the cases in support of these doctrines are quite distinct; the exposition of the doctrine of subrogation appearing in a current of authorities commencing with *Wright v. Morley*, 11 Ves. 12; that of contribution finding leading authority in *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 78; and the doctrine under discussion, which is not distinguished by a name, unless we might import into it that of substitution, is traced to the ancient case of *Maure v. Harrison*, digested in 1 Eq. Cas. Abr. 93, K. 5. The argument will not, at first thought, be traced to the same principle as that which entitles the surety to the right of subrogation; for this is referable to those deliverances of conscience and morals which afford especial protection in equity to him who stands bound merely for accommodation, and without valuable consideration or benefit to himself, and which, upon the same ground,

entitles the surety who has paid the debt to have contribution of his co-surety—the equity in each case having become so familiar and well-established as to be regarded rather as a legal principle and enforced as a legal right. But in the last analysis, the principle of which we are in search, may, in its primary application, be traced to the same source, and be found in the conscientious regard of the court for the protection of the surety, and as an incident merely. This protection appears forcibly in several of the later cases. 10 Leigh, 206; 1 Lead. Cas. Eq. (3d Am. ed.) 164; 12 Leigh, 387; 18 Ohio, 46. Apparently in conflict are 9 Cranch, 43, 292. But we assert that any equity to the creditor arises subsequently, and because of certain conditions, the insolvency of debtor and surety, or danger arising of a fraudulent diversion of the security. See 1 Johns. Ch. 119, 129; 19 Ves. 349; 2 Johns. Ch. 418; 1 Paige, 298, 615; 3 Saund. Ch. 428. These are the authorities upon which the notion of a trust is founded; but they do not touch the question of the surety's right to surrender the security to the debtor, if done in good faith and before insolvency. The State of South Carolina is not insolvent, and cannot be, so long as there is property to be taxed and persons to pay. But there is no question of contract here; it is only an equity. Cases above cited, and 14 Ves. 169; 4 Johns. Ch. 149. Not being a contract, its repeal by the legislature violates no constitutional provision; being for the indemnity of the surety, it is for him to determine the kind and measure of his indemnity, if he shall deem it to his interest to hold it at all.

This equity of the creditor or surety can attach only to securities in hand, and cannot attach to those which have been disposed of in good faith. 16 Conn. 139; 29 Conn. 25. Before resort was had by the creditor to this security, the second mortgage was created, and their contract is now superior to this mere equity. The case of *Hand v. Railroad Company*, 12 S. C. 314, was different from this case; there the bond constituted a lien.

Mr. S. Lord, Jr., Mr. J. H. Rion, and Mr. W. H. Brawley, contra.

McGOWAN, A. J.—It will contribute to a clear understanding of these cases to make a short statement of facts out of which the questions arise.

The Greenville and Columbia R. R. Co. was incorporated by acts of the general assembly in 1845–6 and 1849, for the purpose of building a railroad from Columbia to Greenville, with branches to Abbeville and Anderson. In 1854 the company executed a mortgage to Charles M. Furman, Esq., trustee, of their entire railroad, including “the bed and superstructure, of the materials used in the construction, the iron, stations, station-houses, depots, fixtures, workshops and machinery, rolling stock and all the land and real

estate belonging to said company," with two inconsiderable exceptions, not important here, to secure bonds of the company which had been and were about to be issued, to the amount of \$800,000, for the purpose of completing the road.

In 1861 these bonds, secured as aforesaid, were about to fall due, viz., in 1862, 1863 and 1864. At maturity they might be sued, and the company desired further time. They also desired that the state, which was a large stockholder, should in some way contribute an equivalent for the assessment which had been exacted from the private stockholders, and the following scheme was adopted: The property of the company was improved in value since the mortgage was executed, and the debt was enlarged by over \$100,000, and the time for payment was extended twenty years upon the whole \$900,000, which was to be secured by the guarantee of the state, and another lien to be declared by statute to the state in substitution of the first mortgage. The mortgage was to be taken up and the statutory lien become the first. To accomplish these purposes was past the act of January 28th, 1861, entitled "An act to lend the name and credit of the state to the Greenville and Columbia R. R. Co., in relation to the readjustment of their debt." 12 Stat. 885. This act authorized the comptroller-general to endorse bonds of the company to the amount of \$900,000, and declared "that as soon as the comptroller-general shall have made any such endorsement on any bond, the whole estate, property and funds within the state which the said company may then possess or shall afterwards acquire, shall thenceforth stand pledged and mortgaged to the state, without any further act or deed on the part of the company, for the faithful and punctual performance on the part of the said company of such contract, and the payment of such obligation in priority and preference of any other debt which the said company may then or any other time owe, except the bond debt now secured by mortgage, which shall enure to the benefit of the state, as hereinafter provided," etc. These endorsed bonds were not to be used by the company for any other purpose than for "funding the debt of \$100,000 now due by the company on notes and accounts, and of taking up the bonds of the company already issued and now secured by mortgage," etc. At that time the war was going on, and the transfer of the mortgage debt to the statutory lien went on slowly. Part of the mortgage bonds were never exchanged, and the \$700,000 which were issued under the act bore date during the war, and were entitled "Confederate States of America."

In 1866 the war was over, but, as there might be difficulty about the bonds which had been issued during the war, it was determined to reissue them with another caption; to renew the authority contained in the act of 1861 for issuing the \$200,000 which had not been issued, and to put into the form of certificates of indebtedness

the interest which had accrued, amounting to \$350,000. To accomplish these purposes the act of 1866 was passed, and thus far the act was substantially a re-enactment of that of 1861, adding nothing to the debt; for the lien was originally for \$900,000, as well as the interest which might accrue. But the company had incurred new debts to the extent of \$600,000, and the occasion of the passage of this act was taken to make a provision for funding that debt by a compromise of one for three. To do this required \$250,000, and, by the fifth section of the act, certificates of indebtedness to that amount were authorized and guaranteed. The act did not assume to create any new statutory lien, but to re-enact and extend that of 1861 so as to cover the whole issue originally authorized and interest, and also the new element of \$250,000, and was entitled "An act to alter and amend an act to lend the name and credit of the state to the Greenville and Columbia R. R. Co. in the readjustment of their debt." 13 Stat. 395, 427.

In 1867, the company executed a second mortgage of their entire road and property to Cyrus D. Melton, Esq., as trustee, to secure other bonds of the company to the extent of \$1,500,000. The state neither authorized her guarantee nor declared a statutory lien to secure these bonds. The mortgage itself, after reciting the first mortgage, the guarantee of the state and the statutory lien arising therefrom, declares in terms that the mortgage "is to be subject to the first mortgage and the statutory lien aforesaid." [See mortgage.]

In 1868, the convention which framed the constitution passed an ordinance which declared "suspended and inoperative, until ratified by the general assembly, all acts, or pretended acts of legislation purporting to have been passed by the general assembly of the state since Dec. 20th, 1860, pledging the faith and credit of the state in aid of corporations," etc. 14 Stat. (Ordinances), 35.

In 1869, the legislature, upon condition that the company would release its right of exemption from taxation, re-enacted the act of 1866, and a further endorsement of bonds to the amount of \$50,000 was authorized to be applied to take up the interest of the mortgage and guaranteed debt becoming due from January 1st to July 1st, 1868. 14 Stat. 183.

In 1870, under "An act to provide a sinking fund and the management of the same," the controlling interest owned by the state in the stock of the company was sold, and shortly after a new board of directors assumed control of the affairs of the company, and, it is alleged, issued a large amount of guaranteed bonds without complying with the terms and conditions imposed by law. 14 Stat. 388.

In 1871, the legislature passed an act entitled "An act to promote the consolidation of the Greenville and Columbia R. R. Co. and the Blue Ridge R. R. Co.," the fifth section of which,

it is claimed, postponed all statutory liens prior to that date in favor of the second mortgage. 14 Stat. 590.

These are the acts under which this litigation arises. There is no testimony before us. The company not being able to pay all their obligations, questions of priority of lien soon arose between the holders of guaranteed bonds and the second mortgage bonds, the latter claiming that the act of 1871, last above referred to, postponed all statutory liens in favor of that of the second mortgage. The case first stated—*James S. Gibbes v. The Greenville and Columbia R. R. Co. and others*—was instituted in 1872 by guaranteed bondholders for themselves and other creditors to foreclose mortgages, for relief, etc. The other case mentioned was in the nature of a cross-action by the attorney-general to protect the interest of the state, foreclose mortgage, enjoin creditors, for receiver, etc.

In these cases, heard together, Judge Melton, in 1872, appointed John S. Green, referee, enjoined the creditors of the company from suing, ordered them called in to prove their demands, and that the pleadings should be amended by making Charles M. Furman, trustee under the first mortgage, and C. D. Melton, trustee under the second mortgage, defendants. The referee called in all creditors of the company, and November, 1872, made his report showing the different classes of bonds, so far as they were presented, in their priorities, etc. In 1874, Judge Carpenter extended and enlarged the reference. In May, 1878—C. M. Furman and C. D. Melton, both having died in the mean time—Judge Shaw ordered that the pleadings should be amended so as to make parties H. H. De Leon, trustee, substituted for C. M. Furman, and W. A. Clark, substituted trustee for C. D. Melton. The pleadings were so amended, and the cases heard on the merits by Judge Pressley, who declared the priorities, appointed a receiver to take charge of the road, and ordered another reference. To this decision various classes of creditors have filed exceptions and the appeal comes to this court. The brief does not contain any further report from the referee or exceptions thereto. The number and amount of the different classes of bonds, or whether they were issued according to law, do not appear. This court cannot see the bearing of its judgment upon the actual facts, and can do no more than to announce the principles upon which the final report should be framed.

The cases on Circuit were fully argued, and, as the Judge states, "without any objection from any one that there was want of proper parties;" but it appears that after his decree was rendered, one Bolivar B. Furman, ex parte, filed his petition in re *James S. Gibbes v. The Greenville and Columbia R. R. Co. et al.* claiming that as the first mortgage conveyed the property of the mortgagor to "C. M. Furman, his heirs and assigns,"

the petitioner, who is the heir of the said Furman (we suppose eldest son) was and is invested by descent with the legal title to the property and trustee as successor, and insisting that he is a necessary party to the proceedings, and should be impleaded as a defendant. Judge Mackey, to whom the application was made, dismissed the petition, on the ground that "the petitioner has no interest in the subject matter or the issues involved." From that order petitioner appeals, and raises the first question in the case.

The claim of the petitioner comes late, and is purely technical. The intention was to make C. M. Furman the depository of a personal confidence in the nature of a passive trust; no beneficial interest or transmissible estate was conveyed to him by the mortgage, which was only a security for the bondholders. It was competent for the court, at the instance of the parties in interest, to appoint a trustee as successor of Mr. Furman. Judge Shaw appointed H. H. De Leon, and ordered him made a party. The order dismissing the petition of Bolivar B. Furman is affirmed, and the appeal therefrom dismissed. *Hill on Trustees*, 285, 291; *McNish v. Guerard*, 4 Strob. Eq. 79; *Devant, Trustee v. Guerard*, 1 Spear, 242; *Ex parte the Greenville Academies*, 7 Rich. Eq. 478; *Ex parte Mayrant*, Rich. Eq. Cas. 1; *Ex parte Knust*, Bail. Eq. 489; *Dean v. Landford et ux*, 9 Rich. Eq. 423.

The next preliminary inquiry is, whether the ordinance of the constitutional convention passed in 1868, declaring inoperative the acts of 1861 and 1866 until reaffirmed by the act of 1869, affects, by changing the date of lien or otherwise, the rights of the parties in these cases. It is not easy to define the powers which a convention of the people may rightfully exercise. It has been doubted whether any act of mere legislation in a state having a constitution can be passed by a convention called for a particular and different purpose. The body is not constituted with two houses, and in other respects lacks the organization necessary for ordinary legislation. The convention of 1868 was not called for a purpose fairly embracing the subject of this ordinance, which was never submitted to the people. But from the view taken by the court upon another ground, it is not necessary to consider here the abstract question of the power of the convention. *The State, ex rel. McCrady v. Hunt*, 2 Hill, 1.

It is not competent for one legislature, which is the regular law-making body, to repeal acts of a previous legislature under which private rights have vested, and, clearly, the convention had no higher power. The ordinance in this respect derives no force from the anomalous condition of the state growing out of the war. It is probable, from the time fixed from which the suspension was to commence—"December 20th, 1860"—that the ordinance was made on the idea that all acts of the legislature after secession were

void. If so, such assumption was unfounded. *Keith v. Clarke*, 7 Otto, 477. Private rights vested during the war are recognized as entitled to the protection of the constitution of the United States. A provision of the state constitution itself which impaired the obligation of contracts made during the war has been declared null and void. *Calhoun v. Calhoun*, 2 S. C. 283; *Cochran v. Darcy*, 5 S. C. 125. The ordinance was and is without the force of law. So much of the act of 1869 as reaffirmed the act of 1866 was unnecessary, and the rights of the parties must be determined as if the ordinance never existed.

The most important question in the case is that made by the holders of bonds under the mortgage of 1867, known as the second mortgage. It will be remembered that, in the order of time, the date of that mortgage, and certainly of all bonds held under it, is subsequent to the statutory lien created by the act of 1861, amended by the acts of 1866 and 1869. But it is earnestly urged that the fifth section of the act of 1871 postponed the statutory lien so as to leave the mortgage of 1867 next after the first mortgage. The company only executed two mortgages; all other liens were declared by statute; and the effect of postponing the statutory liens would be to leave the mortgages standing in the order of their dates. The act of 1871 is entitled "An act to promote the consolidation of the Greenville and Columbia R. R. Co. and the Blue Ridge R. R. Co.," and sections four, five and seven bear upon the point and are as follows:

"SEC. 4. That in view of the consolidation of the Greenville and Columbia R. R. Co. and the Blue Ridge R. R. Co., the action of the said Blue Ridge R. R. Co. in making the bonds authorized under the act of September 15th, 1868, and of the comptroller-general of the state in endorsing the same, and thereby pledging the faith and funds of the state to the payment of said bonds, is hereby ratified and confirmed; and that the making and execution by said Blue Ridge R. R. Co. and said other companies of the mortgage aforesaid to Henry Clews, Henry Gourdin and George S. Cameron, to secure the payment of the bonds aforesaid, is also ratified and confirmed, and said mortgage is declared to be a lien prior to that of the state on all property described in said mortgage, and on the entire line of the road aforesaid, and on all the properties of said several companies, or which they or either of them, may hereafter acquire; but nothing in this act contained shall be construed to divest the state of its lien on the estate and property of the said several railroad companies, or of either of them, for its endorsement of the bonds aforesaid, but said lien is postponed to and declared to be subject and subordinate to that of the mortgage hereinbefore mentioned, to Henry Clews, Henry Gourdin and George S. Cameron, trustees.

"SEC. 5. That all statutory or other liens or lien, encumbrances

or encumbrance, equities or equity, except the mortgage encumbrances now upon the property, assets, effects, rights and franchises of said Greenville and Columbia R. R. Co., or any part thereof, and also except the mortgage herein authorized, shall be and are, or is hereby made subsequent to the mortgage encumbrances now in existence thereon and subsequent to the one herein authorized, so that the holders of the bonds secured by said mortgages, or either of them, shall have a lien and security as between each other, according to the time said mortgages have been or shall be recorded, and a prior lien to all other liens or encumbrances whatsoever, any law or laws to the contrary notwithstanding.

"Sec. 7. That after the consolidation of the Greenville and Columbia R. R. Co. with the Blue Ridge R. R. Co., the bonds now held by the Greenville and Columbia R. R. Co. and the Blue Ridge R. R. Co., shall be endorsed by the consolidated company."

It does not appear that this act was ever accepted by the Greenville and Columbia R. R. Co. or its creditors, or went into operation in whole or in part. Indeed, the contrary appears. The company executed the second mortgage, which, in its terms, recognizes as superior the first mortgage and the statutory lien. The title of the act has been stated. In the usual manner it is divided into sections, but they all relate to the one subject of the act; otherwise there would be two or more acts in one under a false name, and violating the provision of Section 20, Article II., of the constitution, which declares that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." But we think that all the sections of this act, properly construed, have reference to the subject expressed in the title. The fourth section provides for the waiver of a statutory lien on the Blue Ridge R. R., the property of one of the companies to be consolidated. The fifth section provides for the waiver of the statutory lien on the Greenville and Columbia railroad, the property of the other company being prepared for consolidation. The seventh section provides that "after the consolidation the bonds now held by the Greenville and Columbia R. R. Co. and the Blue Ridge R. R. Co. shall be endorsed by the consolidated company." Are these sections each an act independent of the others, or all parts of one whole? The object as stated, and as appears from the act itself, was to consolidate the two companies. Considered in reference to its purpose, the act is a unity with several parts. Each section brings its contribution to the end in view. If the taking effect of the charter of the consolidated company and its endorsement of the bonds are not technically conditions precedent to the waiver of the lien, they are provided for by the same act and are parts of one plan, and must stand towards each other in the relation of mutual and dependent

provisions. In the order of time, of course, the companies had to be consolidated before such consolidated company could endorse the bonds; but is it not apparent that the endorsement, though later in the order of time, was to be the counterpart and consideration of the waiver? The fact that the parts are in different sections does not alter the case. The division into sections is purely arbitrary. Part of an act, isolated and disconnected from the context, may defeat instead of give effect to the intention of the law-maker. The fifth section of the act of 1871, which was inserted as part of a plan to consolidate the two companies, cannot, after that purpose has failed, be enforced for the sole and different purpose of effecting priorities in one of said companies. The object of the act having failed, each and all of its parts also fail.

But if the fifth section of the act of 1871 is to be considered as a law in itself, independent of the other sections and the purposes of the act, was it within the power of the legislature to pass such a law? We need not repeat what we have said upon the subject of the infringement of rights through the forms of law in connection with the ordinance of the convention. It has, however, been earnestly and ably argued that these bondholders contracted for no other security than the obligations of the company and the guarantee of the state; that they will still have that if the lien is postponed; that they never had any vested interest under the statutory lien, which was a collateral indemnity created by the state for the sole purpose of securing herself, and, as it was a creature of the state, solely to indemnify the state against loss on the guarantee, the state could waive or relinquish it at her pleasure. The principle contended for is that a security given for the protection of the surety may be waived by him, and the creditor has no such interest in the transaction that can supply the want of privity of contract.

We consider that the principle, as stated, has no application to this case, and might be admitted without affecting the result here. It will presently appear that the statutory lien in this case was not given exclusively for the indemnity of the guarantor, but to secure the payment of the debt. The general rule undoubtedly is: That when the principal debtor has given the surety a security against his liability, the creditor is entitled to the benefit of the security. 1 Lead. Cas. Eq. 196; *Homer v. Bank*, 7 Conn. 483; *Jones v. Quinnipiack Bank*, 29 Conn. 25.

There are cases in which the principle may seem to be modified, but, when carefully examined, it will be found that they stand on their peculiar circumstances, as where the security was given after the original agreement for the sole purpose of indemnifying the surety and not for the payment of the debt. The case above cited of *Jones v. Bank*, which, in the argument, was relied upon

by both sides, may be taken as declaring both the rule and the modification. The principles announced in that case are the following:

"When a mortgage is given to secure a debt, whether the debt be in a negotiable form or not, a transfer of the old debt transfers in equity the security, if the security has not previously been surrendered by the creditor." "But when a mortgage is given, not to secure a debt, but to indemnify a security, then the security does not, in the first instance, attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the securities arises afterwards, and comes into existence only upon the insolvency of the parties holden for the debt."

Apply the principles here announced to this case, and the whole point resolves itself into a question of construction: Whether the statutory lien was given to secure the debt or to indemnify the guarantor? Did or did not the bondholders contract to secure their debt? It seems to the court that there can be no doubt upon that point. They held a perfectly good security under the first mortgage. The state passed an act, and thereby proposed to them to exchange their mortgage security for the statutory lien. They did so, and the terms of the act constitute a contract between the company, the bondholders and the state, as clearly as if a new mortgage had been executed by the company, and the state had guaranteed the bonds as additional security. That contract was made at the time the bonds were guaranteed, and as part of the original arrangement, and each party has a right to insist upon its terms. Was it exclusively to indemnify the state or to secure the debt to the bondholders? It is true, it was to the state, as the first mortgage was made to C. M. Furman, but expressly and in terms to secure the payment of the debt. The act of 1861 has on the face of the covenant these words: "For the faithful performance on the part of the said company of such contract, and the payment of such obligation in priority and preference of any other debt which the said company may then, or at any other time, owe, except the bonded debt now secured by mortgage."

The act of 1866 has these words: "That the statutory mortgage contained in the second section of the act of which this act is amendatory shall constitute a lien on all the property, etc., to secure the payment of the principal and interest of the whole debt of \$1,500,000 thus guaranteed in the adjustment of the original mortgage and guaranteed debt of said company, also the debt of \$600,000 and interest thereon, which is now secured by mortgage." And the act of 1869 declares "that the statutory lien is hereby extended to cover the additional sum of \$50,000 herein provided," etc.

Can there be any doubt from the terms of these acts, that the statutory mortgage was not given exclusively to indemnify the state as guarantor, but, in express terms, to secure the debt to the

creditor? This subject has lately received exhaustive consideration by this court in the case of *Hand v. Savannah and Charleston R. R. Co.*, 12 S. C. 314, and it is quite unnecessary to say more than to repeat the words of Chief Justice Willard, as the organ of this court in that case, in which the facts were less plain than they are in this:

"In all these cases the intention is clearly expressed that the security taken shall be for the payment of the bonds. It is in no case said that it is taken for the special indemnity of the state as endorser. That is undoubtedly implied, but the direct provision is for the payment of the bonds. A provision for the payment of the bonds is primarily a security for those holding the bonds. It is also in equity, and at law when its forms permit it." (P. 342.) "The foregoing conclusions establish the proposition that the bond and coupon holders took a mortgage or lien upon all the property of the old company intended by that act to be subjected to such mortgage or lien, which the legislature had no right to destroy or postpone, as such attempt was in violation of the provisions of the constitution of the United States and of this state forbidding the passage of a law impairing the obligation of a contract." (P. 356.)

The next question is as to relative priorities of the different classes of bonds guaranteed by the state and held under the first mortgage. It is not questioned by any of the parties that the first mortgage of 1854 is the first lien upon the property of the company to the extent of the bonds that have never been exchanged, but are still outstanding in their original form. But it is not conceded that this is true of that portion of those bonds which were exchanged for guaranteed bonds, and are now in the possession of the state. It is insisted that the state, having guaranteed other bonds issued by the company in lieu of them, which substituted bonds are interest-bearing obligations, that the bonds in the possession of the state, are, in effect, paid, and should be regarded as either cancelled or held as cumulative security for a particular class of the guaranteed bonds. The statutory lien was intended as a substitute for the first mortgage, and if all the bonds had passed under the statutory lien, the first mortgage would have become "*functus officio*," and the statutory lien taken its place as the first, and, in that event, the bonds received in exchange would have died with the mortgage. The exchange, however, was not made of the whole, but only of part. At first view it would seem that the same result should follow as to the part exchanged, and that the bonds taken up should be regarded "*pro tanto*" paid, and the mortgage cancelled, except so far as was necessary to cover the bonds still outstanding. On the other hand, there may have been good reasons for keeping alive the lien of these transferred bonds under the mortgage until the whole amount was transferred. But be that as it may, the words of the act are too plain and explicit to admit the

view that they are to be considered paid. The act declares expressly that the bonds thus taken up and deposited with the "president of the bank shall stand as security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired." All the bonds secured by mortgage have not yet been retired, and we cannot declare a result directly in the face of the act. It is not conceived that the outstanding mortgage bondholders have any right to complain of this. They accepted the mortgage security, knowing that it covered the whole \$800,000, and there is little equity in the claim that as each bond passed from under the mortgage the value of the mortgage to that extent must be enhanced for their benefit. All the bondholders had the right to stand still as those outstanding have done. It is the same to them whether the state holds them or the original owners.

Accepting this view it is insisted in the next place that at least no interest should run on the bonds held by the state until after the company ceased to pay interest on the guaranteed bonds substituted for them; otherwise, it is said, the company pays interest twice on the same debt—on the bonds held by the state, and also on the guaranteed bonds given in exchange for them. This would be true if the bonds transferred to the state had been directly for the benefit of the holders of the guaranteed bonds as cumulative security. In that case the payment of one security would discharge the other pro tanto. But these are not double securities to the same creditor. The parties were competent and they have made this arrangement. The guarantee and the statutory lien stand as the security of the bondholder, and these mortgage bonds are the security of the state for its liability as guarantor.

Interest is only the legal accretions of the principal and becomes part of the debt. The security of the transferred bonds and interest not being to the same creditor, is unaffected by payments on the guaranteed bonds, but is affected by its character as an indemnity, and as soon as the guaranteed debt is paid, and the state saved harmless, its functions, as a guarantee, will have been accomplished, and the excess, if any, fall into the assets of the company. It may be remarked, in passing, that this claim of the state, under the first mortgage, is primarily an indemnity to the state as guarantor, rather than a direct security to the bondholders for their debt, and in this regard differs from the security of the statutory lien, which, as we have seen, is a security primarily for the creditor. Being an indemnity, it may be that this security of the state, according to the principle so strongly urged upon the court, might be relinquished or waived by the state, but the claim is as a bondholder under the first mortgage, which is expressly excepted from the operation of the fifth section of the act of 1871, in regard to waiver.

It only remains to consider the relative priorities as between the

bonds issued under the acts of 1861, 1866 and 1869. The court is not informed whether there are any bonds still outstanding, issued under the act of 1861, and still having the caption of "The Confederate States of America." If there are any such, they are unaffected by the provisions of the acts subsequently passed, the terms of which they have not, directly or indirectly, accepted, and must rank next after the first mortgage bonds as the first class of guaranteed bonds.

The act of 1866 did not assume to create a new statutory lien, but to reaffirm and extend that of 1861. It did, however, enlarge the amount of bonds authorized to be issued from \$900,000 to \$1,500,000—a difference of \$600,000; but of this apparent enlargement \$350,000 are for interest which had accrued, and which, in fact, was part of the old debt, so that to the amount of \$1,250,000 the act of 1866 was substantially a substitute for the act of 1861. If the interest had not been represented by certificates of indebtedness, the debt and interest which were already under the mortgage and statutory lien, would have amounted to this statutory sum. But the fourth section of the act of 1866 did provide for another issue of bonds and certificates of indebtedness, to the amount of \$250,000, to fund the floating debt of \$600,000, by a compromise of one for three. To this extent a new debt was incorporated and the old lien of 1861 extended over it. It is argued that this was a wrong done to holders of bonds issued under the act of 1861 and reissued under the act of 1866—the \$700,000 confederate bonds; that the legislature cannot extend the lien which belonged exclusively to them over an increased debt, and thus impair the value of their security; that to extend an old lien over a new debt, is, in effect, to create a new lien for the new debt, which must leave the old debt under its own lien and take its place in the order of priorities by the date of the extending act. There is great force in this view, so far as the element of new debt is concerned, and we have already held that the bonds issued during the war under the act of 1861 and never passed under the act of 1866 must have priority and take rank from the date of the former act. But as to those bondholders who came in and accepted bonds issued under the act of 1866, we think this objection does not apply. They have accepted the advantages offered by the act of 1866, and they must take its disadvantages. This principle of estoppel is fully developed in the case of *Hand v. Railroad* before referred to. We can add nothing to what is there said also upon this point, and will not reopen the argument. The court says: "It is too clear for argument or the citation of authorities, that one taking a provision made for himself by statute, must take upon the condition upon which it is offered. This principle equally applies to express conditions and such as may be fairly implied from the terms of the statute." (P. 348.)

To this it is replied that this is a different case from that of

Hand. That the act of 1866 offered no valuable consideration and imposed no conditions; that it only reissued the bonds in a different style. That the act is not a unity, but divisible, and, in fact, four different acts in one. That the first section provides simply for the reissue of the bonds issued under the act of 1861; that the second section only provides for the deficit under the same act; that the third section provides for an issue of certificates to pay interest, and that the fourth section provides for a new issue to fund the floating debt. It is true that these provisions are in different sections, but they are part of one act upon the same general subject. None of the above sections re-enacts the lien; that is in still another section, the sixth, which declares "that the statutory mortgage contained in the second section of the act of which this is amendatory, shall constitute a lien to secure the payment of principal and interest of the entire debt of \$1,500,000, thus guaranteed in the adjustment of the original mortgage and guaranteed debt of said company, and also the debt of \$600,000 and interest thereon, which is not secured by mortgage." The results of the war had made necessary a readjustment of the debt of the company. The act of 1866 embodies a carefully prepared plan upon the whole subject, and not upon any separate part. So far as its general purpose is concerned, it is an entirety, and we cannot avoid the conclusion that those who accepted some of its provisions are bound by all.

The act of 1869 provides as follows: "That to enable the said company to fund the interest due upon their mortgage and guaranteed debt for the six months, viz., from January 1st to July 1st, 1868, the comptroller-general is authorized and directed to endorse the name and credit of the state upon the bonds and certificates of indebtedness of the said company to the amount of fifty thousand dollars, to be applied in all respects and in the same manner and with the same conditions and restrictions as is provided in the act of December 20th, 1866, for the funding of interest, and the statutory lien is hereby extended to cover the additional sum of fifty thousand dollars herein provided."

The company and the bondholders accepted this act. The bonds and certificates of indebtedness were issued, we must suppose, in accordance with its terms, and the last question is made by W. A. Clark, trustee under the second mortgage. He insists "that, as the act of 1869 was passed after the second mortgage was executed, the \$50,000 bonds issued under its provisions are subject to the lien of the second mortgage bonds."

The Circuit judge states that "there was no proof before him as to the date of any of the second mortgage bonds, but it is quite certain that it was after the act of 1871, which purported to postpone the statutory lien."

It was stated at the bar that this was a mistake in fact, and we have no evidence upon the subject before us. It does not, however, seem to us to be a material inquiry whether any of these bonds were issued between May, 1867, and February, 1869. It must be remembered that these bonds were issued only to fund interest in arrears.

Should the bonds and certificates issued under the act of 1869 be postponed to the second mortgage bonds only because of the date (1869) of the act which authorized their issue? The act of 1869 created no new debt, but put in a new form on credit the interest on the old debt from January to July, 1868. The coupons funded were already secured by the lien of 1866. They were as high security as the bonds from which they had been cut, and entitled to share "*pari passu*" with them. *City of Kenosha v. Lamson*, 9 Wall. 483; *City of Lexington v. Butler*, 14 Wall. 282; *State v. The Spartanburg and Union R. R. Co.*, 8 S. C. 129. If the coupons had not been funded they would now have the effect of enlarging the lien debt by the amount of this issue. Must the holders of these bonds be postponed only because they accepted these bonds and certificates in exchange for their coupons already secured by lien? That must depend upon the terms upon which they were issued and received. Whether one security operates in payment or satisfaction of another, is always a question of intention. Did they intend to discharge the coupons already due and relinquish their lien by taking in satisfaction bonds for the same amount not due for twenty years, and to be secured by a postponed lien? The bond or certificate is not the debt, but the evidence of it. Nothing is payment but that which produces payment, or is received as payment. To give one security for another of equal dignity, without the intention of discharging the debt, is not payment, but substitution, and in such case it is well settled that a lien, such a mortgage previously existing, is not discharged, but remains and still secures the debt in the new form. *Burton v. Pressly*, *Cheves' Eq.* 1; *Costello v. Cave & Bradley*, 2 Hill, 528; *Gardner v. Hust*, 2 Rich. 608; *Kelsey v. Rosborough*, 2 Rich. 244; *Bank v. Bobo*, 9 Rich. 34; *Adger v. Pringle*, 11 S. C. 527; 6 Wait's Act. & Def. 410, 413, 417.

Here the intention is not doubtful. The bonds were issued and accepted, according to the terms of the act, which is the contract of the parties, and this declared expressly that the statutory lien of 1866 "is extended over them." From the view which the court takes, the bonds issued under the act of 1869 should have priority to the bonds issued under the second mortgage of 1867, without regard to the date of their issue.

The result of this reasoning would be to place the bonds issued under the act of 1869 on the same footing with those issued under

the act of 1866; but that part of the Circuit decree which places the bonds of 1869 "after" the bonds issued under the act of 1866, not being appealed from, we are not at liberty to disturb it.

It is adjudged that the Circuit decree be affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

FIRST NATIONAL FIRE INSURANCE COMPANY AND OTHERS

v.

STEPHEN SALISBURY AND OTHERS, TRUSTEES, AND ANOTHER.

(180 *Massachusetts Reports*, 808. Feb. 21, 1881.)

A railroad corporation mortgaged its property and franchise to trustees to secure the payment of certain bonds, by an instrument which provided that, until default, the corporation should remain in possession; that if the bonds were paid the conveyance should be void; and that, on default of the payment of the principal and interest on any bond, and on request of one half in amount of the holders of the bonds, the trustees should sell the property and apply the proceeds to the payment of the bonds. *Held*, that, on default in the payment of interest, the trustees had the power to foreclose and take possession of the property, although not requested so to do by one half in amount of the bondholders.

A bill in equity, brought by less than one sixth in amount of the holders of bonds secured by a mortgage given by a railroad corporation, against the trustees under said mortgage, to compel them to take possession of the property mortgaged, alleged that there had been a default in the payment of interest on the bonds; that the corporation had signified a purpose not to pay interest on the bonds unless the holders thereof would take a less rate of interest than the bonds called for; that the net income of the corporation was sufficient to enable it to pay interest; that the corporation was applying the income to unsecured debts; and that there was danger that, if this course continued, the property would be inadequate security for the payment of the mortgage. *Held*, on demurrer, that the bill could be maintained.

It is no defence to a bill in equity to compel trustees, under a mortgage given by a railroad corporation, to take possession, on default of the corporation to pay the debt secured by the mortgage, that litigation may be necessary to ascertain what property is covered by the mortgage; or that a great burden and personal liability for injuries done and debts subsequently incurred will thereby be imposed upon them.

If a railroad corporation executes a mortgage to trustees to secure the payment of certain bonds, and afterwards executes a second mortgage to the same trustees to secure other bonds, the bondholders under the second mortgage are not necessary parties to a bill in equity by the bondholders under the first mortgage to compel the trustees to take possession of the mortgaged property.

If a bill in equity is brought by one sixth of the holders of bonds, issued by a railroad corporation and secured by a mortgage, against the trustees

named in the mortgage, the other holders of bonds secured by the same mortgage will be allowed to come in as plaintiffs.

COLT and MORTON, JJ., absent.

Bill in equity, filed February 16, 1880, by sixteen holders of certain bonds issued by the Boston, Barre and Gardner R. R. Corporation, in behalf of themselves and others who should come in to prosecute the bill, against the trustees under a mortgage executed by said corporation to secure said bonds, and against said corporation.

The bill alleged that on June 21, 1873, the Boston, Barre and Gardner R. R. Corporation, in pursuance of the authority conferred upon it by the St. of 1873, c. 348, conveyed in mortgage to Stephen Salisbury, Calvin Foster and Lewis Barnard, as trustees, "the railroad of said corporation, with all the appendages and appurtenances, meaning and intending to include the line of said railroad as the same now is or hereafter shall be located, from its southerly terminus in Worcester to its northerly terminus in Winchendon, constructed, in process of construction, and to be constructed, with buildings, road-bed, embankments, bridges, sidings, turnouts, turntables, ties, rails and other parts and appendages, also all the land owned by said corporation, whether within or without its location, also its franchise."

The mortgage, a copy of which was annexed to the bill, after reciting the votes of the stockholders and directors authorizing the issue of bonds to the amount of \$400,000, payable in twenty years, proceeded as follows: "Now therefore the condition of this instrument is that if the said Boston, Barre and Gardner R. R. Corporation shall well and truly pay or cause to be paid each and every such bond, and the interest accruing thereon according to the tenor and effect thereof, then this instrument shall be void, but otherwise shall remain in full force. And in default of the payment of the principal or interest of any of said bonds as aforesaid, and in case the same shall remain due and unpaid for the space of six months, and in case also the trustees aforesaid shall be in writing requested thereto by one half in amount of the holders of said bonds, and not otherwise, the said trustees are hereby authorized, empowered and required to sell the mortgaged premises aforesaid, at public auction, to the highest bidder, giving three months' notice of said sale in one or more newspapers published in the several cities of New York, Providence, Boston and Worcester, and to execute and deliver proper deed or deeds conveying the same to the purchaser or purchasers thereof, being the highest bidder or bidders therefor, and to apply the net proceeds of said sale after retaining therefrom the expenses of said sale and a suitable compensation for their own services, to the payment of all of said bonds remaining unpaid, whether due or not due, if said proceeds

are sufficient therefor, and if not sufficient, to divide the same ratably among the several holders of said bonds according to the amount thereof and the balance thereof, if any, to pay over to said corporation. Provided, however, that if said corporation shall, at any time before such sale, pay or tender or cause to be paid or tendered to said trustees or either of them, for the use and benefit of said bondholders, the full amount of principal and interest then due upon said bonds with the expenses incurred by said trustees, including a reasonable compensation for their own services, an account of which expenses and services they shall render to said corporation upon request within a reasonable time, such sale shall not be made, but whenever a new default to pay the principal or interest upon said bonds shall occur, and continue as aforesaid, and a new request shall be made by one half in amount of the bondholders as aforesaid, the same proceedings shall be had in all respects in regard to the sale of said mortgaged premises, and the application of the proceeds thereof as hereinbefore provided, and with the same right of payment of principal and interest due to the corporation. And it is further provided that the said Boston, Barre and Gardner R. R. Corporation shall remain in possession of said mortgaged premises whenever not in default of the conditions hereof, and for six months after any default. And the said Stephen Salisbury, Calvin Foster and Lewis Barnard, parties of the second part, covenant and agree to and with the Boston, Barre and Gardner R. R. Corporation, party of the first part, that they will truly execute and perform the trusts hereby reposed in them, to the best of their judgment and discretion, provided always that neither of said trustees, their executors or administrators, shall be liable or accountable for the acts, doings or default of the others, or either of them, nor for any loss or damage unless the same shall arise through his own negligence or default."

The bill further alleged that the whole amount of the bonds secured by the mortgage were duly issued and sold, and the same are now outstanding unpaid; and that the plaintiffs were the owners of such bonds to the amount of \$64,000, at their par value.

That on July 16, 1875, the railroad corporation executed to the same trustees a second mortgage of its railroad and franchise, enumerating therein all its real and personal property, subject to the first mortgage, to secure bonds to the amount of \$300,000.

That the corporation has made default in the payment of the interest due April 1, 1879, on the bonds owned by the plaintiffs and on other bonds of the same issue, and such default had continued more than six months; that, after the breach of condition had continued for six months, the plaintiffs notified the trustees and requested them to take possession of the mortgaged premises, for the purpose of receiving the rents and profits and applying them to the purposes of the trust; but the trustees refused, and

pretended that they were of opinion that it was not for the interest of the plaintiffs and other holders of bonds to take possession.

That the corporation was, by means of the property mortgaged, earning and receiving large amounts of money over and above its running expenses, and had been, for a long time before and since said default in the payment of said interest as aforesaid, in receipt of large earnings over and above its expenses, sufficient, if faithfully applied, to pay the whole of the interest on the bonds secured by the first mortgage according to the terms and effect of said bonds; that the corporation had applied said earnings to the payment of unsecured liabilities, and to expenditures in no way in the interest of the plaintiffs, or other holders of said bonds secured by the first mortgage.

That by the terms and effect of the first mortgage the legal title to the entire line of railroad owned by the corporation, with all appurtenances and appendages and all the land of said corporation within or without its location, together with all its locomotive engines, cars and implements fitted, designed, adapted and procured, whether before or after said mortgage, for use in connection with and upon said railroad, passed by said mortgage, as incident to the franchise, or part of the realty, or otherwise, to the said trustees, and was vested in them in trust for the purposes expressed in said mortgage.

That upon the breach of the condition of the mortgage, continued for six months as aforesaid, the trustees became at once entitled to the possession of all and singular the premises conveyed by the mortgage, and it became and was their duty forthwith to take possession thereof for the purpose of securing the application of all rents and profits, above necessary running expenses and repairs, to the payment of said bonds according to their tenor and effect.

That if the trustees should take possession of the property conveyed by the first mortgage, and manage the same with ordinary prudence and skill, the net income and profits readily to be derived therefrom would more than pay the entire interest accrued and to accrue on all the bonds secured by the first mortgage.

That certain judgment creditors of the corporation had seized on execution certain cars, locomotives and other property which were covered and conveyed by the first mortgage; and, upon sale thereof under said execution or executions, certain persons had pretended to buy said property and in some way and on some terms, not known to the plaintiffs, had let the property to the corporation who was now using the same; that said proceedings, so far as they covered and affected any of the locomotives, cars and rolling stock of the corporation, were wholly void and of no effect as against the mortgagees in the first mortgage.

That there was danger, if the interest on the bonds was allowed

to increase and the corporation allowed to apply the whole of the income of the mortgaged property to other purposes, that the property would not be sufficient to pay the interest on the mortgage bonds and to pay the principal at maturity; that the omission and refusal of the trustees to take possession of the mortgaged property and apply the income and profits thereof to the purposes provided in said mortgage, and to foreclose said mortgage, was a violation of the duty imposed by the trust.

That said trustees were interested, either personally or as officers of certain institutions, in the bonds secured by the second mortgage, and that the judgment of the trustees was affected adversely to the plaintiffs' rights by said interest.

That the corporation, besides refusing and neglecting to pay the interest falling due April 1, 1879, had wholly refused and neglected to pay any part of the interest on said bonds falling due October 1, 1879, and threatened and avowed that it would pay no part of the interest due or to become due on said bonds and other bonds of the same issue, held by other persons, unless the holders thereof would accept interest at a lower rate than provided by the terms of said bonds, and would release all claim for any interest on said bonds above said reduced rate, whether already accrued or to accrue in the future, and would also release and waive all claim on a part of the property conveyed by the first mortgage.

The prayer of the bill was that the trustees be ordered to take possession, and the corporation be ordered to deliver to them possession, of all the property conveyed by the first mortgage, and also of all the property conveyed by the second mortgage, for the purpose of receiving and applying the net income and profits thereof to the payment of the interest of the bonds of the plaintiffs and others of the same issue and date, and also for the purpose of foreclosing the mortgage in case the bonds should not be paid according to the tenor and effect thereof, and that in case said trustees refused or neglected to act in the premises a receiver might be appointed to take possession of said property for the purpose of applying the net income and profits to the payment of said bonds according to the tenor and effect thereof; and for further relief.

The defendants demurred to the bill for want of equity, and because the holders of the bonds secured by the second mortgage had not been made parties to the bill.

The case was heard on the bill and demurrer by Ames, J., and reserved for the consideration of the full court.

After the entry of the case on the law docket for argument, Francis T. Blackmer and fifty-one others filed a petition in the case, averring that at the times the defaults occurred in the payment of interest, as alleged in the bill, they were holders of bonds secured by the first mortgage to the amount of \$228,100; that

the bill had not been authorized by them; and that it was not for their interest, or of any of the holders of the bonds, that the prayer of the bill should be granted; and prayed that they might have leave to intervene in the cause, and become parties plaintiff therein in relation to the further direction and disposition thereof.

An agreed statement of facts was filed, by which it appeared that the petitioners were owners of bonds secured by the first mortgage to the amount stated in the petition; that the plaintiffs did not claim that they had any authority to appear for the petitioners; and that Stephen Salisbury, one of the petitioners, was also one of the defendant trustees.

G. F. Hoar & W. W. Rice, for the defendants.

F. T. Blackmer, for the petitioners.

F. P. Goulding, for the plaintiffs.

SOULE, J.—The instrument under which the defendants hold a conditional title to the railroad with its appurtenances of the Boston, Barre and Gardner R. R. Corporation, is a mortgage which provides that the mortgagor shall retain possession of the mortgaged property till, and for six months after, default in the payment of any of the bonds secured by it, or interest thereon, and that thereafter the defendants, at the written request of one half in amount of the holders of the bonds, are authorized and required to proceed to sell the mortgaged property, and apply the net proceeds of the sale to payment of the bonds in full, or ratably if the proceeds are insufficient for payment in full.

These provisions do not abridge the rights of the defendants as mortgagees, except in those particulars in which they are inconsistent with those rights. In the absence of any stipulation that a mortgagor may retain possession of the mortgaged property, a mortgagee has the right to take possession at any time; and so far as the mortgage to the defendants provides otherwise, it abridges their rights as mortgagees. But the provision as to a sale of the property is in addition to the rights ordinarily in a mortgagee, and not inconsistent therewith, so that the rights of the defendants under this mortgage with reference to possession and management of the property, and for foreclosure of the mortgage after default in payment of interest has continued for six months, are precisely what they would have been if the provisions referred to had not been contained in the instrument, with the additional right and duty, on the request in writing of half in amount of the bondholders, to sell the property and distribute the proceeds. *Shaw v. Norfolk County R. R.*, 5 Gray, 162; *Haven v. Adams*, 4 Allen, 80; *Haven v. Grand Junction R. R.*, 12 Allen, 337.

As the defendants hold the mortgage not to secure a debt due to themselves, but as trustees for the holders of the bonds of the mortgagor, their duties are regulated by the general rules of law which

affect all trustees, and whenever they fail to perform them, either through wilfulness, indifference or error of judgment, the bondholders who are aggrieved by their conduct may obtain relief in this court sitting as a court of equity. This is clear under the general provisions of the statutes giving this court jurisdiction on equity; Gen. Sta. c. 113, § 2; and under the special provisions relating to jurisdiction in equity of all cases arising out of railroad mortgages. Gen. Sta. c. 63, § 128. Among the duties of the defendants as trustees, are these: They must act in good faith for the best interests of the bondholders; they must take care that the property is not wasted nor depreciated; they must see that its income is not improperly diverted from the payment of interest on the mortgage debt as it accrues; and in case of a manifest purpose on the part of the mortgagor to waste or destroy the property, or not to apply the income to payment of interest, to the injury of the bondholders, it is their duty to enter and take possession of the property, and manage it for the security of the *cestuis que trust*. Perry on Trusts, § 749.

Applying these principles to the case before us, it is clear that the bill states a case which calls for the interference of a court of equity. The plaintiffs are holders of bonds secured by the mortgage. They have no means of enforcing their rights in the mortgaged property, except through the action of the defendants. They allege that the mortgagor has been in default in the matter of the payment of interest for more than six months, and that it has signified a purpose not to pay interest on their bonds, unless they will accept payment at a less rate than the bonds call for; that the property with the rolling stock of the mortgagor produces an income sufficient, after paying the running expenses, to pay the overdue interest on the bonds, and to pay the accruing interest; that the mortgagor applies the earnings to pay its unsecured debts, and to uses which do not benefit the plaintiffs, and that there is danger that, if this course continues, the mortgage debt will grow by the accumulation of interest to such amount that the mortgage will be inadequate security for its payment. The demurrer admits the truth of these allegations, and, of course, does not set up a state of facts by way of explanation which justifies the inaction of the defendants. On these facts it is the right of the plaintiffs that the defendants take possession of the property for the purpose of foreclosure, and manage it, and apply the net earnings to payment of the interest on the bonds.

There is no force in the objection that this may render it necessary for the parties in interest to go into litigation to ascertain what property the first mortgage covers, and what it does not cover, in order to settle the rights of the bondholders under the second mortgage, as distinguished from the bondholders under the first mortgage. The rights of the plaintiffs are the same that they

would be if the second mortgage had not been made, and there is no reason why they should not enjoy those rights in the fact that the mortgagor has done something, since their rights attached to the property, which will render litigation necessary to define, limit and enforce them. Nor are the rights of the plaintiffs to be affected by the fact that, if the bill is sustained, and the defendants are required to take possession of the mortgaged road and manage it, a great burden of labor and a great responsibility, moral and financial, will be imposed on the defendants, in that they will be personally liable for all injuries done and debts incurred to others in managing the property. This burden and responsibility are incident to the trust which they assumed in taking the mortgage, and it is not for them to say that the *cestuis que trust* must suffer, because it is inconvenient, disagreeable or burdensome for them to do their duty as trustees. *Perry on Trusts*, § 763.

The bondholders under the second mortgage are not necessary parties to the bill. It would be probably impossible to ascertain the names and residences of them all, and their interests are fully represented by the trustees to whom the second mortgage runs, the defendants already in the case. These trustees have no interest adverse to those bondholders, and there can be no other representative of them so fit as the trustees who hold the mortgage security in trust for them all. *Shaw v. Norfolk County R. R.*, above cited.

As the bill states a case which calls for and entitles the plaintiffs to relief in equity, and as all necessary persons are made parties to it, the demurrer is not well taken.

The defendants are trustees for all the bondholders, and the bill is brought by about one sixth of them in amount. It looks to a foreclosure of the mortgage and a closing up of the trust. All the parties interested are entitled to be heard if they desire it, and are proper, if not necessary, parties to the proceedings. The petition of the majority of the bondholders, who were not originally made parties, that they be permitted to come in and be joined as plaintiffs, is the only means which they could adopt to make themselves parties, and to put them into the proper position for insisting on and maintaining their rights. It must therefore be granted. As to the consequences of their becoming parties, we are not called on now to decide.

Demurrer overruled, and petition of bondholders granted.

HANNIBAL HAMLIN AND WILLIAM B. HAYFORD, TRUSTEES.

v.

SIMON G. JERRARD.

(72 Maine Reports, 62. February 4, 1881.)

Under the mortgage to the plaintiffs, purporting to convey to them as trustees all the right, title and interest of the European and North American Ry. Co. in and to "all and singular its property, real and personal, of whatever nature and description, now possessed or to be hereafter acquired, including its railway, equipments and appurtenances; all the rights, privileges, franchises and easements; all buildings used in connection with said railway or the business thereof, and all lands and grounds on which the same may stand or connected therewith; also all locomotives, tenders, cars, rolling-stock, machinery, tools, implements, fuel, materials and all other equipments for the constructing, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof."

Held, 1, that the lien of the mortgage was not lost upon rolling stock withdrawn, under circumstances stated in the opinion, from present use upon the then broad gauge and changed to meet a contemplated narrowing of the gauge, notwithstanding the stock upon the road was kept up or improved at the same time that these materials for the narrow gauge use were withdrawn;

Held, 2, that repairs and improvements made upon such rolling stock by the Consolidated European and North American Ry. Co., which had acquired the right to control the road subsequently to the plaintiffs' mortgage, were in the nature of accessions to a mortgaged chattel, and subject first to the mortgage that had priority of date;

Held, 3, that there can be no loss of identity of the original companies in the consolidation to the prejudice of the rights of prior creditors, or to the destruction of prior liens, and that such increased values do not belong to the consolidated company as a distinct entity;

Held, further, that the plaintiffs, being in possession of other rolling stock to which their own mortgage does not apply, purchased by the New Brunswick company, which consolidated with the E. and N. A. Ry. Co., or the consolidated company, and mortgaged by them to other trustees; the plaintiffs, having the right to use and consume it in the performance of the duties the corporation owed to the public, and being liable to the mortgagees for their interest, under the facts stated, may recover its full value of the attaching creditors of the mortgagor, or the attaching officer; holding any part to which their own mortgage does not apply, in trust, or subject to their liability to those from whom they received possession, as they held the property before the attachments were made.

On report.

Trespass against the defendant, as sheriff of Penobscot county for entering plaintiffs' premises at Oldtown, September 1, 1877, and taking and carrying away one narrow gauge locomotive engine, of value of three thousand dollars; four and a half set of wheels and truck frames, of value of four thousand dollars; one hundred

and twenty pairs of wheels with axles, of value of five thousand dollars; and one hundred iron truck frame sides, of value of one thousand five hundred dollars, and twenty-six platform cars, of value of seven thousand two hundred dollars.

Writ is dated September 18, 1877. Plea is general issue, with brief statement as follows:

And for brief statement and further defence, the defendant says that by virtue of a certain writ which issued out of the clerk's office of the Supreme Judicial Court of Maine, in and for Penobscot county, in favor of James H. Haynes et als. and against the Consolidated European and North American Ry. Co., one Jesse Prentiss, of Milford, in said county, in his capacity as a deputy sheriff in and for said county, attached the whole or a part of the property specified in plaintiff's declaration as the property of the said Consolidated European and North American Ry. Co., whose property it there and then was, and not the property of Hamlin and Hayford, trustees, as alleged in their said writ; nor was said property then and there in the possession and keeping of said Hamlin and Hayford, trustees, nor in or upon the premises of said Hamlin and Hayford, trustees, as alleged in said writ. That all the property described in said plaintiffs' writ and declaration, is not now, nor ever was, the property of said Hamlin and Hayford, trustees, and was never, before the attachment aforesaid, in the possession of said Hamlin and Hayford, trustees.

The facts sufficiently appear in the opinion.

The law court to enter such judgment as the evidence requires. The matter of damages to be hereafter determined at nisi prius unless the parties otherwise agree.

Charles P. Stetson and William L. Putnam, for the plaintiffs, cited: R. S., c. 51, §§ 28, 47-56; *Morrill v. Noyes*, 56 Maine, 458; *Shepley v. A. and St. L. R. R. Co.*, 55 Maine, 407; *K. and P. R. R. Co. v. P. and K. R. R. Co.*, 59 Maine, 9; *Pierce v. Emery*, 32 N. H. 484; *Shaw v. Bill*, 5 Otto, 10; *Phi. W. and B. R. R. Co. v. Woelpper*, 64 Penn. St. 366; *Meyer v. Johnston*, 53 Ala. 467; *Dillon v. Barnard*, 1 Holmes R. 386, 394; *Farmers' L. and T. Co. v. S. Jo. and Denver R. R. Co.*, 3 Dillon, U. S. C. C. R. 412; *Wilson v. Boyce*, 2 Dillon, 539; *Pierce v. Mil. and S. P. R. R.*, 24 Wis. 551; *Farmers' L. and Tea Co. v. Fisher et al.*, 17 Wis. 114; *Scott v. C. and S. R. R. Co.*, 6 Bissell, 529, 534; *Pennock v. Coe*, 23 Howard, 117; *Dunham v. R., etc., Co.*, 1 Wallace, 254; *Galveston R. R. Co. v. Cowdrey*, 11 Wallace, 459; *Foster v. Saco Manufacturing Co.*, 12 Pick. 454; *Rowley v. Rice*, 11 Met. 333, 336; *Moody v. Wright*, 13 Met. 17; *Cook v. Corthell*, 11 R. I. 482; *Williams v. Briggs*, 11 R. I. 476; *Palmer v. Forbes*, 23 Ill. 300; *Henshaw v. Bank of Bellows Falls*, 10 Gray, 568.

Henry W. Paine and Barker, Vose & Barker, for the defendant.

It is admitted that this road was broad gauge till the fall of 1877.

This narrow gauge property was all prepared and purchased by the Consolidated European and North American Co.

It is proved (and not denied) that this old stock narrowed was replaced by new stock, and that the road was kept up to its accustomed efficiency; and more, that the rolling stock of the then broad gauge road was very materially benefited in 1874 and 1875.

It is provided—article seven, of the land grant mortgage, that the “party of the first part, may in its discretion, sell, exchange, or otherwise dispose of any locomotives, tenders, cars,” and “all other personal property which may become impaired by use, or require renewal” “and convey the same free and clear of all lien of this mortgage,” “but all property of whatsoever kind, obtained in place of the property sold or disposed of, shall be subject to, and bound by the lien of this mortgage.” When, then, the rolling stock is broken up, and ceases to be rolling stock, it ceases to be bound by the lien, and more especially if other stock has been substituted for it.

Forty-five pairs wheels and axles, which were put on to the road by the old European and North American Ry. Co., and which came into the possession of the consolidated road at and by consolidation, having been replaced by the said consolidated company by new stock, and the mortgage of the old European and North American Ry. Co. (Hamlin and Hayford, trustees) having been made good and complete, and the same (forty-five pairs) entirely eliminated from said Hamlin and Hayford’s mortgage by its own terms and agreements, the right and title to the said forty-five pairs wheels and axles is clearly in the consolidated company. More especially since the same (the forty-five pairs) was narrowed by, and the cost thereof paid by the consolidated company.

Therefore Hamlin and Hayford, trustees, have no title to the said forty-five pairs old wheels and axles, under or by their mortgage, they being the property only of the consolidated company, the title being complete in the same.

The six pairs in paper A, manufactured by Eddy, the one pair manufactured by McDugle, and the one pair manufactured by Acadian Iron Works (per Angell’s testimony, page 67) came from the “western extension branch from St. John, westward to Vanceboro’, Maine,” at and by consolidation, and were narrowed by the consolidated company, the title of which is fully vested in the consolidated company, by reason of the same (old stock, not in use, etc., etc.) having been replaced by said consolidated company, and thereby entirely eliminated from the lien of the mortgage of the “western extension branch from St. John, westward.”

Certainly Hamlin and Hayford, who bring this suit, have no

right, title or claim to the said western extension wheels and axles under their mortgage, nor ever had, neither in law nor equity.

The balance of wheels and axles, including trucks, sides, etc., was all new narrow gauge stock, and bought by the consolidated company.

Now, the consolidated corporation prepared and purchased, and was the owner of all the property when the sheriff took it.

This is neither property (the forty-five pairs wheels and axles excepted) possessed by the Maine corporation, when it made its transfer to the trustees, Hamlin and Hayford, nor was it afterwards acquired by that corporation.

In fact, before this property (excepting the forty-five pairs old E. & N. A. and the eight pairs western extension wheels and axles) was acquired, the Maine corporation had ceased to exist; it had been merged in the consolidated company, and by and through said consolidation, and the subsequent replacement with new stock, as above stated and proved, by said consolidated company, the title to all the property sold on this execution is fully vested in said consolidated company.

The intention of the two companies, and the act of confirmation by the legislature, was a dissolution of the two companies, and a new corporation formed. *State v. M. C. R. R. Co.*, 66 Maine, 488.

The agreement between Smith, trustee, and Hamlin and Hayford, trustees, dated Bangor, September thirtieth, 1876 (page 35), does not give said Hamlin and Hayford any right or authority to bring or maintain a suit in their names for the recovery of this property, to which Hamlin and Hayford have no title.

It is a maxim of the common law, that a person cannot grant what he has not. And it is a familiar principle that words in a deed importing a transfer in presenti, of goods which the mortgagor does not own, will not vest a title in the mortgagee, when the mortgagor subsequently acquires them. But if after the property has come into the possession of the mortgagor, he delivers it to the mortgagee, with the intention to ratify the mortgage, the title will vest.

It is provided in said Consolidated European and North American R. R. mortgage deed to Smith and another, as follows:

"Eighth. It is further agreed that the said party of the first part, shall at the request of said trustees (Smith and Hersey) execute and deliver such further deeds of conveyance of all the property now possessed, or to be hereafter acquired by said party of the first part, herein conveyed or intended to be conveyed, and upon the trust herein set forth, as may be necessary for the better security of said bonds."

No "such further deeds of conveyance" of the property they possessed, or thereafter acquired, have been made.

Smith took possession, as trustee under the mortgage, of the entire road and the property embraced in the deed, in October, 1875, and remained in possession till October, 1876. Did that vest a title in him to this property? In an elaborate opinion in *Jones v. Richardson*, 10 Metcalf, 493, it was decided that the mere taking possession of after-acquired property by the mortgagee, is not enough. It is necessary to prove that the mortgagor had delivered possession of the goods to hold under the mortgage with the view of carrying the former grant into effect.

And even that, says the court, would not be sufficient as against creditors, unless the mortgagee retains possession, or records the mortgage with the town clerk.

Smith did not retain possession, neither did he record the mortgage with the town or city clerk.

Therefore Smith could not maintain an action at law against the sheriff. The legal title to this property is still in the consolidated corporation, it is not covered by Smith's mortgage, and if Smith has no legal title, he certainly cannot pass the title of this property to Hamlin and Hayford, as he has attempted to do.

They have none, neither under their mortgage, the "agreement," nor the "bill of sale," and cannot maintain this action.

As to the equitable lien of mortgagees on after-acquired property, see: *Mitchell v. Winslow*, 2 Story Rep. 630; *Pennock v. Coe*, 23 Howard, 117; *Dunham v. Peru*, etc., R. R. Co., 1 Wallace, 254; *United States v. New Orleans R. R.*, 12 Wallace, 369; 2 *Redfield on Railways*, 455.

The questions raised in this case are fully discussed in *Redfield on Railways*, and in *Jones on Mortgages*, and *Jones on Railroad Securities*, and the authorities are therein fully cited upon the one side and the other. We refer to them as follows, viz: "After-acquired property," *Jones on Railroad Securities*, c. 4, § 121, 132, 133, 154; 1 *Jones on Mortgages*, c. 4, § 149 to c. 5; *Rolling Stock*; *Personal Property*. Also, to: *Hoyle v. P. & M. R. R. Co.*, 54 N. Y. 314 (Am. vol. 13, 595); *Randall v. Elwell*, 52 N. Y. 521 (Am. vol. 11, 747); *Strickland v. Parker*, 54 Maine, 263; 1 *Jones on Mortgages*, c. 11, § 452; *McCaffrey v. Wooden*, 65 N. Y. 459 (Am. vol. 22, 644).

SYMONDS, J.—In this action of trespass against the sheriff of Penobscot county, damages are demanded for the acts of his deputy in taking upon writs, and selling upon executions, against the Consolidated European and North American Ry. Co., certain pieces of narrow gauge rolling stock, to which the plaintiffs claim title superior to that of the judgment debtors.

The twenty-six platform cars, mentioned in the declaration, were replevied by the plaintiffs from the possession of the officer. The locomotive engine was never removed or sold by him, but was

either replevied or abandoned. As to these, therefore, no claim for damage arises here. The subjects of the present action are the four and a half sets of wheels and truck frames, one hundred and twenty pairs of wheels with axles, and one hundred iron truck-frame sides, of the alleged value of four thousand dollars, five thousand dollars and one thousand five hundred dollars, respectively. These were attached, January 13, March 7, and March 31, 1877, and sold, January 9, 1878, by the defendant's deputy, as the property of the consolidated company. The question is upon the plaintiffs' right to them at the date of the attachments; and this is the only question, as the terms of the report reserve a further hearing at nisi prius, for the assessment of damages, if the plaintiffs prevail.

The European and North American Ry. Co. was a corporation chartered by this State, August 20, 1850, to build a railroad from the city of Bangor to the eastern boundary of Maine, so as best to connect there with a railroad from the city of St. John, to be constructed to that point under a charter from the province of New Brunswick. This railroad in Maine, then in process of construction, together with the timber lands which it had received from the State, on March first, 1869, was conveyed to two trustees, of whom the plaintiff, Hannibal Hamlin, is one, and the other is represented in regular succession by the plaintiff, William B. Hayford, to secure the payment of the principal and interest of two thousand bonds of one thousand dollars each, issued by the corporation. The provisions of this deed to the plaintiffs, in mortgage and in trust, will be more fully considered. It is enough at present that under it they claim title to the property in controversy.

The corporation, organized under the province charter was called the European and North American R. R. Co. for extension from St. John westward, and constructed its road to the point of connection with the road built under the charter from Maine, so that the two made a continuous line of railway of the same gauge from Bangor to St. John. The New Brunswick road was conveyed to trustees in a similar way, July 1, 1867, to secure an indebtedment of two millions of dollars in mortgage bonds.

These two roads, built and equipped under different charters, by the authority of different States, and by the use of distinct funds, appear to have been controlled by separate management, as independent lines, until October 19, 1872, when articles of union and consolidation between them were drawn, which were adopted and ratified by the corporations, to take effect, we judge, on the first day of December, 1872. Legislative authority from the State and the province for making the union, is recited in the articles of agreement, and a special act of confirmation was passed by the legislature of Maine, March 3, 1874. By the terms of these articles, the two companies were to become one corporation, under the name of the Consolidated European and North American Ry. Co.

On December 5, 1872, a conveyance to trustees was made by the consolidated company of the whole line, and all its property, to secure the payment of six millions in new bonds; five millions of which were to be issued only for the redemption and payment of the earlier bonds of the companies composing the consolidated line; "the proceeds of the residue of said consolidated bonds to be used by the directors to provide for further and additional way and tracks, rolling stock, equipments and railway improvements, and to provide for the purchase of and consolidation with other connecting railroads, and to pay the debts of said New Brunswick company and said Maine company, existing at the time this agreement takes effect, and for no other purposes whatever."

The consolidated company continued in the possession and control of the road till October, 1875, when formal application was made by bondholders to the surviving trustee under this last named mortgage, to take possession of the mortgaged estate for breach of condition, and thereupon, upon request from the trustee, a majority of the directors in writing on October 27, 1875, surrendered and delivered to him "the premises and property named and described in the mortgage deed . . . and all the property used and provided for operating the railroad of said company for the uses and purposes named in said mortgage deed;" and appointed an agent to go over the road with the trustee and put him in possession thereof. This was done.

This action of the majority was approved at a meeting of the directors held on the second of December, 1875; and the trustee under the consolidated mortgage continued in the possession and operation of the road until, in September, 1876, a bill in equity was filed by the present plaintiffs to recover possession of the road in Maine under the prior mortgage to them in trust. Pending this bill in equity, an agreement was made and entered upon the docket by which Benjamin E. Smith, the trustee under the consolidated mortgage, delivered to the plaintiffs, "to hold as provided in paragraph third, in said land grant mortgage to them, the railroad from Bangor to the east line of the State of Maine, and all property connected therewith, rolling stock, fuel, equipments, and all the railroad and property belonging thereto from Bangor to the State line, in his charge and possession as said trustee; and if there is any property not covered by said land-grant mortgage taken or used by said trustees, or to which said trustees are not entitled by the terms of said mortgage to them, or by law, the rights of said Smith shall not be impaired by said transfer of possession. . . ."

Under this agreement and by virtue of their mortgage, the plaintiffs on October 2, 1876, went into possession of the road from Bangor to the east line of the State and continued to operate it until, and after, the date of the attachments under which the defendant justifies. Precisely what was the property connected with the

railroad, of which the plaintiffs then took and subsequently retained the possession, will be the subject of later inquiry.

It is in evidence that in 1873, while the consolidated company was operating the road, a change of the gauge, from broad to narrow, was contemplated. Nothing appears upon the records of the stockholders or the directors relating to it, nor was the change effected till the summer and fall of 1877, but that it was intended by those in charge of the road, and that certain preparations were made for it, as early as 1873, is apparent. In this way and for this purpose, during that year the narrow gauge rolling stock, which is the subject of the present controversy, was accumulated upon and near the grounds of the company at Oldtown. The change of gauge being delayed, it remained there till the time of the attachments, except that, lying so long idle, some parts of it which could be easily changed over were taken, when convenient, and used upon the then broad gauge. The purpose of the consolidated company, however, in purchasing and preparing it was undoubtedly to meet the anticipated change of gauge. It was not obtained with a view to use it upon the road as it then was, nor could the property attached, as a whole, have been so used without change.

It is probable and, we think, proved by the testimony that there were three sources from which this narrow gauge stock came. Some of it was changed from stock originally belonging to the Maine corporation, some from stock which the province company owned, before the consolidation; and some was new. The purchases of the new, and the repairs upon the old, were made at the order and expense of the consolidated company.

This property, so situated, the plaintiffs claim to hold under the broad provisions of the mortgage to them of the road in Maine. They gave the defendant the written notice required by R. S., c. 81, § 42, in due time before commencing this action; claiming therein to hold it under the mortgage to them, and also as bailees of the property embraced in the consolidated mortgage.

We understand the grounds of defence to be, first, that this stock was embraced in neither mortgage, and was open to attachment and seizure on execution against the consolidated company; secondly, that, as to so much of it as was new, it was the property of the consolidated company, purchased by them, and never subject to any lien in the plaintiff's favor, so that as to their claim it is immaterial whether the consolidated mortgage to other trustees included it or not; in other words, that it was not embraced in the mortgage to plaintiffs, which is their only source of title; that, as to so much as was at first the property of the province company, and was changed to narrow gauge by the consolidated company, the plaintiffs are equally without pretence of title; the original purchase having been made by one company and the repairs by another, neither of which has given the plaintiffs any

mortgage; that, as to so much of it as once belonged to the Maine company, if it was then subject to the mortgage to the plaintiffs, it had been relieved of that lien under the seventh section of the trusts declared in the mortgage, to the effect, in substance, that the railroad company may sell, exchange, or otherwise dispose of rolling stock, or other personal property impaired by use or requiring renewal, and convey the same free from all lien of the mortgage, the property substituted therefor being held and bound in its place; that this right of the Maine company passed to the consolidated company, when formed, and that inasmuch as the stock upon the road was kept up or improved at the same time that these materials for the narrow gauge use were withdrawn, such a disposition of them discharged the mortgage, *sub modo*, transferring its force and effect from them to the stock supplied and set upon the road in their stead.

The last branch of the second ground of defence is distinct and independent, and may be considered at once by itself. It assumes that the plaintiffs once had a right under their mortgage to a part of the property attached, which they have lost; and relates only to that part.

We cannot assent to the proposition that the gradual changing of such parts of the broad gauge stock, as needed repair and could be withdrawn from immediate use without detriment, into narrow gauge stock, in view of an expected change of gauge, was such a disposition of it as under the clause of the mortgage cited would release and transfer the mortgage lien. This was neither a sale, exchange nor disposition of the property by the road. It was, on the contrary, the retention of it, of its title and possession, at the same time fitting it to serve new uses, which the requirements of the road, its management in a new and legal way, were expected to demand. A change of gauge cannot be made at once, nor without preparation. We see no more reason why, under the clause cited, the lien of the mortgage should be lost upon stock taken off from the road to be changed to fit a new gauge, expected to be made, than for its being lost upon any piece of rolling stock, not required for the present operation of the road and removed for the purpose of repair. In neither case does the company dispose of it. In both instances, it remains the property of the corporation, and, although unused for the time, it does not lose its character as property connected with the use of the franchise and designed to serve the purposes of the charter. Had there been a failure to change the gauge, it is apparent from the statements of the witnesses that the materials of the stock attached, and certain parts of it, even without change, were of use and value on the broad gauge. Whether it be regarded as new narrow gauge stock procured under an expectation of change, or as mere materials that the broad gauge road might make available, it still pertained to the road and its franchise, and,

if the mortgage to plaintiffs held it when in use as broad gauge stock on the Maine road, the mortgage upon it was not discharged nor the security of the bondholders in whose behalf the plaintiffs act impaired, under the seventh clause, by the changes made in it under such circumstances, nor by its temporary disuse, awaiting the narrowing of the gauge.

The result, then, is, that this claim in defence is not tenable; that if that part of this stock which came into the consolidation from the Maine road, about forty-five pairs of wheels and axles, according to the testimony of Mr. Angell, was once subject to the plaintiff's mortgage, the facts of the case were not such as to discharge the mortgage, pro tanto, by the substitution of new for old, sold, exchanged, or otherwise disposed of.

It remains to inquire whether at the date of the attachments the mortgage to plaintiffs as trustees gave them a valid lien upon either, or all, of the three classes of property attached; distinguishing the classes only by the sources from which the property came, or the title was derived.

The question may perhaps conveniently be divided into two.

I. Overlooking for the moment the fact of consolidation and the relations of the uniting roads, suppose all that was done in purchasing and preparing the stock attached had been done by the old European and North American Ry. Co., which mortgaged to the plaintiffs, would the mortgage have covered the same property as the attachments, and been valid against them?

II. What was the effect of the consolidation, and what are the intervening rights of the consolidated company, or its other constituent?

I. The first question assumes, it will be seen, that the Maine company had been in possession of its road, subject to the mortgage to the plaintiffs, had intended a change in gauge and with that view had altered some old, and bought some new stock, to fit the new gauge, the change had been delayed, the plaintiffs had taken possession for condition broken, and the stock so collected had remained idle, deposited on or near the railroad grounds, till the attachments were made. It assumes facts as nearly parallel as possible with the facts of the case at bar, except that, instead of having three companies to deal with, the plaintiffs' mortgagors are the only actors on that side of the transaction.

The mortgage to the plaintiffs, after describing the timber lands granted, purports to convey all the company's "right, title and interest in and to all and singular its property, real and personal, of whatsoever nature and description, now possessed or to be hereafter acquired; including its railway, equipments, and appurtenances; all its rights, privileges, franchises, and easements; all buildings used in connection with said railway or the business thereof, and

all lands and grounds on which the same may stand or connected therewith; also, all locomotives, tenders, cars, rolling stock, machinery, tools, implements, fuel, materials, and all other equipments for the constructing, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof."

The validity of mortgages of the property, and even of the franchises, of railroads in this State is recognized both by statute and by decision. *R. S.*, c. 51, § 47; *Shepley v. Atlantic and St. Lawrence R. R. Co.*, 55 Maine, 407; *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 59 Maine, 9, 23.

The road was in the process of construction when the vote of the stockholders was passed, directing the issue of the bonds and the mortgaging of the whole line from Bangor to the eastern terminus, part of which only was completed, to secure them. We think the vote contemplated and authorized such a mortgage as the directors gave.

We regard it as settled by the weight of authority that any property connected with the use of the franchise of a railroad corporation for the purposes intended by its charter, to be subsequently acquired, may be effectually mortgaged. The validity of such a lien upon after-acquired property is distinctly held by this court in *Morrill v. Noyes*, 56 Maine, 458, 471, at least against a later mortgage given after the property was in existence and in the possession of the company; and the language of the court is quite as applicable to the case of a subsequent attaching creditor. "That a mortgage of a railroad and the franchises of the company with all the rolling stock then owned and to be afterwards acquired and placed upon the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt."

"It may therefore be regarded as judicially settled, with little or no divergence of opinion, that in equity a mortgage of a railroad will be held to apply to after-acquired rolling stock, and other personal property, if the terms of the mortgage cover such future acquisitions; with the qualification, however, that the mortgage will attach to such property subject to the liens existing upon it when it comes into the hands of the mortgagor."

The authorities upon this point are freely cited in the elaborate briefs in this case. The following are important cases, illustrating the principles involved: *Pennock v. Coe*, 23 How. 117; *Dunham v. Ry. Co.*, 1 Wall. 254, 266; *Galveston Ry. v. Cowdrey*, 11 Wall. 459, 481; *United States v. New Orleans Ry.*, 12 Wall. 362; *Shaw v. Bill*, 5 Otto, 10; *Meyer v. Johnson*, 53 Ala. 237, 324; *Scott v. Railroad*, 6 Biss. 529, 535; *Maryland v. North Central*, 18 Md. 193; *Pullan v. Cen. and Chi. R. R.*, 4 Biss. 35, 43; *Brett v. Carter*, 2 Lowell, 58; *Barnard v. Nor. and Worc. R. R.*, 4 Clifford, 351; *Mitchell v. Winslow*, 2 Story, 630; *Pierce v. Emery*, 32 N. H. 484; *Cook v. Corthell*, 11 R. I. 482; *Hope v. Hay-*

ley, 5 Ellis and Bl. 829; *Holroyd v. Marshall*, 10 House of Lords, 191, 220.

There can be no doubt that, on the hypothesis on which we are now proceeding, namely, that the plaintiffs' mortgagors accumulated this stock, it would have been embraced within the description of the property mortgaged. It certainly was property, real or personal, connected with and intended for the use of the road as a railroad; not for its present, immediate use, but for its use in the event of an expected change, for which it was necessary to prepare. It was covered by the general and by the specific designation of property in the mortgage.

It is not necessary to enter upon the vexed question of what is the precise legal nature of railroad rolling stock. Whether it is to be regarded as a fixture, or a mere accession acquired under the franchise as a necessary incident, and so indispensable to its exercise, and to the operation of the road, as to become a part of it; whether there may be other considerations which include it within the entirety of the road and affect it with the characteristics of realty; or whether on the contrary the fact that there is neither annexation, immobility from weight nor localization in use—*Hoyle v. Plattsburg and Montreal R. R.*, 54 N. Y. 314—is decisive, under all the circumstances, of its character as personal estate, are questions on which the courts are at variance. They do not necessarily arise here. For the present purpose, we shall treat this rolling stock, which was prepared with reference to a change of gauge that did not take place till after the attachments, and so had not been placed upon the rails nor fitted to them as they then were, as personal property. But, if this is conceded, it is still personal property of a distinctive character and of a kind that, supposing it to have been acquired by the plaintiffs' mortgagors, we think the mortgage intended and was effective to convey. It is not like the State claims against the federal government, assigned in trust for the benefit of this railroad, and which it is not pretended were included in the mortgage; nor like the earnings of the road in carrying freight acquired after the date of the mortgage, the legal title to which, with entire reservation as to what the result might be in equity, was held in *Emerson v. European and North American Railroad*, 67 Maine, 387, not to pass to the trustee under the consolidated mortgage till his possession began. The rents and profits of the mortgaged estate usually go to the mortgagor, till reduced to the possession of the mortgagee. The mortgage does not purport specifically to convey such earnings nor claims against the government. But all rolling stock to be acquired, as well as materials and equipments for constructing, maintaining, operating, repairing and replacing the road and its appurtenances or any part thereof, are within the specific statement of property mortgaged.

"If the engines and cars are not fixtures, they are so connected

with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not in esse cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it is so appurtenant to it that the company have a present existing interest in it sufficient to uphold the grant of both together, the one as incident to the other. Their title to the railroad is the foundation of an interest in the cars and engines to be acquired for its use."

We think that such property as this, of a class specially mentioned in the mortgage, acquired for lawful railroad purposes, on hand for present use, or to meet expected requirements, is held by the mortgagors subject in equity to the mortgage from the time their title and possession accrued, and that when the trustees become actually possessed of it under the mortgage, they may hold such possession at law against the attaching creditors of the corporation. "At law, property, non-existing, but to be acquired at a future time is not assignable; in equity it is so. At law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it." *Holroyd v. Marshall supra*.

The mortgage under which the plaintiffs claim does not appear to have been recorded as a chattel mortgage. The attachments would therefore take precedence of it but for the fact appearing in evidence, that the plaintiffs were in possession when the attachments were made.

It is true that in one notice given to the officers and employees by the trustee under the consolidated mortgage, when he took possession, he declares that he has taken possession of the railroad and "all property used in operating the same;" which description might not include the property in controversy. Substantially similar language is used by the plaintiffs in one notice given by them of the fact of their having taken control. But, as we have already seen, the consolidated company in writing surrendered to their trustee "the premises and property described in the mortgage deed . . . and all the property used and provided for operating the railroad." In another public notice, Smith describes himself as taking "possession of all the property named in said mortgage, for condition broken," and this language is also followed by the plaintiffs in one notice given by them of the fact of their possession. By the docket entry, under the bill in equity, we have seen, Smith

delivered to the plaintiffs the railroad from Bangor to the State line, "and all property connected therewith and . . . belonging thereto," with the reservation before stated; and the notice there given by him, October 2, 1876, conforms very nearly to the docket entry."

But, independently of these proceedings in writing, the testimony of witnesses satisfies us that Smith, while he had charge of the road as trustee, had actual possession of this narrow gauge stock, and that it was delivered by him to the plaintiffs and by them retained till the attachments. At both times we think it was included in the inventories of corporate property taken by the trustees; checked and marked as it was set down therein. It was under the charge of their servants. The journals were painted twice by their order to protect them from rust. It was all upon railroad premises and adjacent grounds. We have little hesitation in finding from the report the fact that it was in the plaintiffs' possession under their mortgage at the date of the attachments.

With this fact established, under our statute which declares such a mortgage void, except between the parties, "unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded," the unrecorded mortgage of personality takes precedence of the attachments. The New York statute, unlike ours, seems to require "an immediate delivery, followed by an actual and continued change of possession," to make the unregistered mortgage effectual. Under our law, if the mortgage is in force between the parties, and the mortgagee takes possession under it before the attachment and is in possession then, the mortgage holds. In other words, there may be a taking of possession by the mortgagee at a later date than the mortgage, just as it may be re-recorded later, and with the same effect. The want of immediate delivery of property at the date of the mortgage does not render it void. It is valid against attaching creditors from the time of record, or of possession taken. *Beeman v. Lawton*, 37 Maine, 544-5; *Wheeler v. Nichols*, 32 Maine, 233, 241.

We reach the conclusion, then, that if only the funds of the old European and North American company had gone into the stock attached, and it had been procured and kept by them in the same manner and under the same circumstances, as it was by the consolidated company, it would have been held by the plaintiffs' mortgage, and that the want of record, they being in possession, would have given the attachments no validity against them.

II. It would be an important question, if it were directly presented, whether the net income of the property of the Maine company, so far as it became invested in property such as is described in that mortgage, even if the investment were made by a new corporation that had acquired the right to run the road, could ever rightfully be diverted from its legitimate use in lending additional

security to the first mortgage bondholders. It is clear that all accessions to the road and its appurtenances in Maine, after consolidation as before, were accessions to a mortgaged estate, and subject first to the mortgage that has priority of date. If the consolidated company increased the value of mortgaged property by the avails of a later mortgage, such mortgage must be postponed to the earlier one on each part, just as if each company separately had put a second mortgage on its own line of road. The consolidated company assumed the debts of its several parts and recognized the prior liens upon them. It assumed also, by force of law, the burden of having any increased value of the road and its appurtenances go as security, first, for those prior liens. It cannot claim that its duty was merely to keep them in statu quo, in as good condition as when received, and that, as against the first mortgagees, additions and improvements belong to itself as a distinct entity. If such a claim were sustained, the very income of the property of the Maine road might go to swell its value, and the clauses conveying future acquisitions become void of effect; although the newly acquired property made part of the value of the road itself. The first mortgage on the Maine road, and the first mortgage on the New Brunswick road, remain the first liens on all acquisitions of the consolidated company, which issue from, and become part of the estate to which those mortgages applied. A due regard for vested interests imperatively demands such a legal conclusion and effect. To reach this result, if the original companies have ceased to exist, or to be capable of organization and action, the consolidated company, notwithstanding the articles of union declare it one, must still be regarded, to save the rights of prior creditors, as two, one in Maine and one in New Brunswick, having the same name and officers, and each representing the original company to whose rights and liabilities it succeeded; with which it has a unity of interest and of obligation. There can be no loss of identity of the original companies in the consolidation to the prejudice of the rights of prior creditors, or to the destruction of prior liens. See *Central Railroad and Banking Co. v. Georgia*, 92 U. S. 665.

Whether the principles of equity proceeding would in any case go further than this, and not only retain for the security of the first mortgagees all accessions to the road and its appurtenances made by the consolidated company, but also give them the right to hold, when reduced to their possession, articles not accessory, purchased by the net income of the mortgaged property, meaning by the net income, strictly the value of the use of the property itself; whether, in this case on such ground, the plaintiffs could claim a lien upon the new stock and that which came from the New Brunswick road to the extent of their interest, as above stated, in the expenditure thereon by the consolidated company; whether the mortgage gave them a right to the income of the

mortgaged estate, so invested and reduced to their possession, that could not be lost upon consolidation, is a question that need not now be considered.

The plaintiffs, at the date of the attachments, had a valid lien under their mortgage upon that part of the stock attached, which came originally from the Maine road to the extent of its value, the repairs upon it being mere accessions to a mortgaged chattel. They were in possession of the new stock, and that which came from the province road, the directors of the consolidated company having put their trustee in possession of it, and he having yielded to the plaintiffs, with the reservation that his legal rights were not to be prejudiced by such transfer of possession. The plaintiffs had the right to use and consume it in the performance of the duties the corporation owed to the public, on the fulfilment of which the interests of all depended. The whole was subject to the consolidated mortgage, and that was the first lien upon it, except as the Maine or province mortgage took precedence. The attachments are not justified. The mortgagee in possession under these circumstances might recover its value against the attaching creditor of the mortgagor. One in possession for the mortgagee, and liable to him for his interest, should recover the same. The plaintiffs held the part to which their own mortgage applied in trust for their bondholders at the date of the attachment. They held all besides this, in trust for the bondholders under the other mortgages to the extent of their several interests, and under the terms of the report, are entitled to recover the value of the whole, at the date of the trespass, holding any part to which their own claim does not attach in trust, or subject to their liability to those from whom they received possession, as they held the property before the attachments were made.

Judgment for the plaintiffs, damages to be assessed at nisi prius.

APPLETON, C. J., DANFORTH, VIRGIN AND PETERS, JJ., concurred.
BARROWS J. did not sit.

HANNIBAL HAMLIN and another, trustees in equity,

v.

EUROPEAN AND NORTH AMERICAN RY. Co. and others.

EGERTON R. BURPEE and another, in equity,

v.

HANNIBAL HAMLIN and another, trustees, and others.

(72 Maine Reports, 83. February 4, 1881.)

A mortgage of a railroad company to trustees for the security of its bondholders of "all its right, title and interest in and to all and singular its property, real and personal, of whatsoever nature and description, now

possessed or to be hereafter acquired, including its railway, equipments and appurtenances, all its rights, privileges, franchises and easements," etc., operates upon the inchoate right of the company to a conveyance of lands under contracts subsequently made as soon as the contracts are made and the company is in possession under them for the purposes of the charter. Such a mortgage will take effect upon lands subsequently contracted for or purchased to secure adequate facilities and space for engine and car houses and other railroad accommodations, to which the company at the time of the purchase had a right and expected to build their road; and such incumbrance will continue though the road is not built to such land, and the right to use them in direct connection with the road, without further legislative authority, has expired. The case of a railroad holding more property for its own purposes than its present needs demand is entirely different from one in which the company buys other property distinct from the road or its appurtenances, not intended or necessary for the present or prospective exercise of its franchise, and therefore not within the purview of the mortgage.

The mortgage attached to the right to a deed of such lands under contract and continued to attach to it as the right grew in value, whether the increased value arose from payments and improvements made by the company or by a new consolidated company which took the entire property and assumed the debts of the first company.

The interest conveyed by an assignment to secure the assignee against loss from liability as an indorser is commensurate only, in degree and duration with the liability it secured.

BILLS in equity, heard upon bills, answers and proofs.

The first is a bill brought by the trustees of the bondholders of the European and North American Ry. Co. against the company, and certain creditors (E. R. Burpee, F. A. Wilson and James W. Emery) of the consolidated company, who had levied upon lands of the company, purchased or contracted for subsequent to the mortgage to the trustees, and called the Crosby lot in Hampden, and the Hincley lot, Lord lot, and Lord and Veazie lot in Bangor, to restrain the defendants from disputing the title and possession of the trustees to such lots, etc.

The second is a bill by the levying creditors, who were parties defendant in the first bill, against the same trustees and the consolidated European and North American Ry. Co., and others for relief, and to remove the cloud upon their title to lands levied upon.

The following are extracts from the mortgage of the European and North American Ry. Co. to Hannibal Hamlin and another, trustees, dated March 1, 1869:

"Now, therefore, the said party of the first part, in order to secure the payment of the principal and interest of said two thousand bonds, issued or to be issued as hereinbefore provided, and in consideration of the premises, and of one dollar to it paid by said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and transferred, and by these presents does grant, bargain, sell, convey and transfer unto said parties of the second part, their successor or successors in

the trusts herein created also, all its right, title and interest in and to, all and singular, its property real and personal, of whatsoever nature and description, now possessed, or to be hereafter acquired; including its railway, equipments and appurtenances; all its rights, privileges, franchises and easements; all buildings used in connection with said railway or the business thereof, and all lands and grounds on which the same may stand or connected therewith; also, all locomotives, tenders, cars, rolling stock, machinery, tools, implements, fuel materials, and all other equipments for the constructing, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof. . . .”

“To have and to hold the aforegranted premises, with all the rights, privileges, easements and appurtenances thereto belonging, hereby conveyed or intended to be conveyed, to the said parties of the second part, their successors, in the trusts hereof, and their heirs and assigns, to their use and behoof, but only upon the trusts hereinafter set forth.”

* * * * *

“Eighth. It is further agreed that the said party of the first part shall, at the request of said trustees, execute and deliver such further deeds of conveyance of all the property now possessed, or to be hereafter acquired, by said party of the first part, herein conveyed or intended to be conveyed, and upon the trusts herein set forth, as may be necessary for the better security of said bonds.”

Other material facts appear in the opinion.

Charles P. Stetson and William L. Putnam, for Hamlin and Hayford, trustees, cited, in addition to authorities cited by them in *Hamlin et al. v. Jerrard*, ante, p. 62; *Blake v. Rollins*, 69 Maine, 156; *Emerson v. E. & N. A. Ry. Co.*, 67 Maine, 393; *Coverdale v. Aldrich*, 19 Pick. 395; *Gue v. Tide Water Canal Co.*, 24 How. 257; *Eldrich v. Smith*, 34 Vt. 484; *Willink v. Morris Canal Co.*, 3 Green's Ch. 377; *Shamokin R. R. Co. v. Livermore*, 47 Pa. St. 468; *K. & P. R. R. Co. v. P. & K. R. R. Co.*, 59 Maine, 22; *Holroyd v. Marshall*, 10 H. of L. Cas. 193; *The Key City*, 14 Wall. 653; *Clark v. Flint*, 22 Pick. 237; *Muer v. Berkshire*, 52 Mich. 149; *Cobb v. Dyer*, 69 Maine, 498; *Barnard v. N. & W. R. R. Co.*, 14 N. B. R. 469; *Palmer v. Forbes*, 23 Ill. 300; *Buck v. Seymour*, 46 Conn. 156; *Hinckley v. Haines*, 69 Maine, 76; *Raymond v. Clark*, 46 Conn. 129; *Hooper v. Bourne*, 3 L. R. 2 B. D. 258; *Betts v. G. E. Ry. Co.*, L. R. 3 Ex. D. 182; *N. Y. C. & H. R. R. Co.*, 77 N. Y. 245; *Clouston v. Shearer*, 99 Mass. 209; *Gerry v. Stimson*, 60 Maine, 189; *R. S.*, c. 51, §§ 53-56; *Jones' Railroad Securities*, 416.

James W. Emery, Woodward Emery and Wilson and Woodward, for Burpee, Emery and Wilson.

The question is between creditors,—bond-holders and judgment creditors. Equity is no more favorable to one set than the other.

The contract for purchase of the three lots of land were made with the European and North American Ry. Co. and assigns, in September and October, 1870.

The consolidation of the "Maine" company, and the "New Brunswick" company, took place Dec. 1, 1872, and by § 6 of the articles of agreement the franchises, property, and "causes in action" of the two old companies, were assigned to the "new corporation" as the consolidated company is called in the agreement, ratified by the legislature of Maine, laws of 1874, c. 609. These contracts being causes in action, were then assigned to the consolidated company, which entered into possession of the entire property at that time, to hold, own and enjoy the same, and from that time until the attachment and seizure and sale on execution, the legal and equitable title in and to those contracts was fully in the consolidated company. *Bath v. Miller*, 53 Maine, 308; *Emerson v. E. and N. A. Ry.*, 67 Maine, 387.

Hamlin and Hayford, trustees, under the first mortgage, claim that said contracts are covered by their mortgage as "after-acquired" property, or as an "accretion" to the property originally mortgaged. We reply that upon scrutiny of the language of the mortgage, the European and North American Ry. Co. mortgaged its property, "now possessed or to be hereafter acquired," and by no possibility could it cover property not acquired by itself. *R. R. Co. v. Maine*, 6 Otto, 499; *State v. M. C. R. R. Co.*, 66 Maine, 488; *Bouvier's Law Dict.* "Accretion;" *Young v. Northern Illinois Coal and Iron Co.*, U. S. C. C. N. D. Ills. 1880; *The "Reporter,"* March 3, 1880.

This levy was extended more than a year since, and we claim title under the levy, the proceedings being regular. *Brackett v. McKenney*, 55 Maine, 504.

The trustees under both said mortgages claim under their respective mortgages. It cannot be claimed that this property was covered by either mortgage. It is not essential to its business, nor is it held by the company's trustees now for any legitimate railway purposes. *Seymour v. Canandaigua and N. F. R. R.*, 25 Barb. 284; *Western Penn. C. C. v. Johnston*, 59 Penn. 290; *Calhoun v. Paducah and Memphis R. R. Co.*, U. S. C. C. W. D. Tenn. April 7, 1879; *"Reporter,"* September 24, 1879.

The criterion is necessity and essentiality for railway purposes, and not what, in the opinion of a sanguine railway official, would be gratifying to him to have at hand for future use of a railway in case it increased its business and manufactured new wants. *Parish v. Wheeler*, 22 N. Y. 494; 1 *Jones on Mortgages*, § 156.

As the company never have and never can without an additional

franchise, use that property, it cannot be considered as included or embraced by the mortgages.

Counsel in an additional brief cited: *Pierce v. Emery*, 32 N. H. 484; R. S., of 1857, c. 51, §§ 31, 33; *Commonwealth v. Smith*, 10 Allen, 448; *Millw. and Minn. R. R. Co. v. Milw. and West. R. R. Co.*, 20 Wis. 187; *Brainard v. Peck*, 34 Vt. 496; *Holbrook v. Finney*, 4 Mass. 566; *Burns v. Thayer*, 101 Mass. 428, and cases cited; *Brown v. Tyler*, 8 Gray, 135; *Smith v. Eastern C. Co.*, 124 Mass. 154; *Noyes v. Rich*, 52 Maine, 115; *Galveston R. R. v. Cowdry*, 11 Wall. 459; R. S., 1871, c. 76, §§ 29, 30; *Virginia v. Ches. and Ohio Canal Co.*, 32 Md. 501; *Swan v. Patterson*, 7 Md. 164; *Brown v. Chesterville*, 63 Maine, 241; *Bacon v. Bacon*, 17 Pick. 134; *Forbes v. Appleton*, 5 Cush. 115; *Crompton v. Anthony*, 13 Allen, 33; *Barry v. Abbott*, 100 Mass. 396; *Anthracite Ina. Co. v. Sears*, 109 Mass. 384; *Powell v. North Miss. R. Co.*, 40 Mo. 63; *Racine and Miss. R. Co. v. Farmers' Loan and T. Co.*, 49 Ill. 331; *Selma, Roam and D. R. Co. v. Harbin*, 40 Geo. 706; *McMahan v. Morrison et als.*, 16 Ind. 172; *State v. Bailey*, Id. 51; *Paine et als. v. Lake E. and L. R. Co.*, 31 Ind. 283; *Lauman v. Lebanon Valley R. Co.*, 30 Penn. St. 42; *Tagart et al. v. Northern R. R. Co.*, 29 Mary. 559; *N. J. Midland C. Co. v. Strait*, 35 N. J. Law, 325; *Ohio v. Sherman*, 22 Ohio, 428; *Clearwater v. Meridith*, 1 Wall. 25; *Shields v. Ohio*, 26 Ohio, 86; *Shaw v. Norfolk Co. R. Co.*, 16 Gray, 407; *Shields v. Ohio*, 95 U. S. 319; *Seymour v. Canandaigua and Niagara Falls R. R. Co.*, 25 Barb. 284; *Walsh v. Barton*, 24 Ohio St. 28; *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465; *Farmers' Loan and Trust Co. v. Commercial Bank*, 11 Wis. 207; *Same v. Cary*, 13 Wis. 110; *Same v. Commercial Bank of Racine*, 15 Wis. 424; *Dinsmore v. Racine and Mil. R. R. Co.*, 12 Wis., 649; *Meyer v. Johnson*, 53 Ala. 237; *State v. Commissioners of Mansfield*, 3 Zab. (23 N. J. Law), 510.

Henry W. Paine and Barker, Vose and Barker, for Edward Cushing, furnished very able briefs, contending that the title to the lands in question was in Cushing as trustee of the consolidated European and North American Ry. Co. See their brief in the preceding case.

SYMONDS, J.—The three parcels of real estate in Bangor referred to as the Hinckley, Lord, and Lord and Veazie lots, the European and North American Ry. Co., in the fall of 1870, contracted in writing to purchase. Possession was then taken by the corporation, and has been retained by those in charge of the railroad from that time to the present. The payments required by the contracts were made by that company, and afterwards by the consolidated company, and by the trustees under each mortgage during the period of their possession. The premises have been

used and improved at considerable expense for depot grounds; the principal improvements having been made before consolidation.

The contracts were assigned by the European and North American Ry. Co., September 12, 1870, to Jewett, Woods and Emery, to secure them against liability as indorsers on the first three of the notes given in each instance for the purchase money. But those notes were paid at maturity, the liability of the indorsers was at an end, and their right to hold the collateral ceased. The assignment had served its purpose. The interest it conveyed was commensurate only, in degree and in duration, with the liability it secured.

The course of reasoning employed in the previous case, *Hamlin et al., Trustees v. Jerrard*, leads directly to the conclusion, that the mortgage to the complainants in the first of these bills in equity, as trustees, operated upon the inchoate right of the Maine company to a conveyance of these lots under the contracts, as soon as they were executed and that company was in possession under them for the purposes of the charter. Their right to a conveyance became at once subject in equity to the mortgage. The mortgagees, upon possession taken, were subrogated to the rights of the mortgagors. By our statute, such a right to the conveyance of lands, may be taken and sold on execution. R. S., c. 76, § 29. Such a mortgage may apply to it as well. At the date of a mortgage like this, given to obtain funds to complete construction, the corporation might be in possession of considerable portions of its road-bed under similar contracts to purchase; or it might subsequently acquire title to parts of its line in that way, instead of pursuing the statutory method. In either case, such after-acquired property, when in pursuance and upon performance of the contract, the full title to it vests in the corporation, becomes part of a mortgaged estate. Any intermediate interest or right gained is equally subject to the mortgage. The manner of acquiring the right of way, or depot grounds, cannot be important. It is upon the right acquired that the mortgage acts. Possession of lands under such circumstances and for such purposes, with the right on certain terms to perfect the title, may be as valuable an incident to the railroad itself, as necessary a part of it, as any leasehold interest or higher estate it may have in another part of its line. See *Barnard v. Norwich and Worcester R. R.*, *supra*, where an after-acquired leasehold interest was held to pass to the trustees under the mortgage.

Nor do we think a different rule applies, as to the payments made by the consolidated company upon these contracts during the period of its possession. Such payments stand upon the same footing as improvements made by that company upon the buildings and grounds. Its position, in reference to the plaintiffs as trustees and to the mortgaged property, is in some respects more truly defined by saying that it is its predecessor in title under a new name

(and something more), than by regarding it merely as the assignee of the original company. It took the entire property, subject to incumbrances, and assuming the debts. Five millions of the consolidated bonds were to be used only to redeem and pay the first mortgage claims. If the exchange of bonds had been completed, the whole consolidated property, with all future additions, would still have been encumbered by substantially the same debt as that secured by the plaintiffs' mortgage, under a new form, and in its own name. If, at the date of consolidation, the Maine company had obtained a clear title to the depot grounds in Bangor, but was in debt for them, had received the deed, but had not paid the purchase money, it is clear that the grounds would have been subject to the plaintiffs' mortgage, while the debt would have been one the consolidated company must pay. Or, if there had been a mortgage on the same real estate when the Maine company received its deed, supposing for the sake of illustration the deed to have been delivered and under such circumstances, and consolidated funds had paid it, the payment would have been of a debt it was the duty of that company to pay, that mortgage would have been discharged, and the plaintiffs' mortgage would have become the first incumbrance upon the land. The mortgage to the plaintiffs attached to the right to a deed of the station-grounds as a part of the road itself, and it continued to attach to it as the right grew in value. The consolidated company, under the articles of union, was not an assignee of these contracts, discharged from the mortgage. The increased value of the right to a conveyance of real estate, which was in the occupation of the company and essential to the road, remained subject to the mortgage as an accession to the road, just as the increase of values along any part of the line, arising from improvements made by the consolidated company in its road-bed, track, or stations, added to the security of the first mortgage bondholders. If the consolidated company, taking the entire property of its predecessor in Maine, subject to mortgage, increased the value of the railroad, and the rights that go with it, by making payments or expending money, that gives it no equitable interest as against the mortgagees. If, at the consolidation, the title of the Maine company to a part of its road-way or yards was imperfect, and payments by the consolidated company perfected it, the mortgage holds the completed title. In regard to these three contracts for the real estate at the station in Bangor, it should be observed, also, that the interest in them which passed to the consolidated company at the consolidation, not only was subject to the mortgage in the sense already indicated, but it was also in its essence, a right, and nothing more, to acquire a thing, which when acquired, as to these plaintiffs, was a part of the road mortgaged to them.

It is not doubted, that an interest in these contracts passed to the consolidated company by the terms of the articles of union. It

would be to that company that the conveyances should be made, when the terms were fulfilled on which the contractors were obliged to give the deeds, unless a legal foreclosure of the plaintiffs' mortgage had changed their interest as mortgagees into an absolute title. But a conveyance to the consolidated company, prior to foreclosure, would inure to the benefit of the plaintiffs, to the extent of their mortgage.

The Crosby lots were purchased and paid for by the European and North American Ry. Co., and the deed was delivered to them, before consolidation. The object of the purchase was to secure adequate terminal facilities and space for engine and car houses, and other railroad accommodations. The road was located to and upon them, but was built only to within about four hundred and seventy yards, and the time for building under the charter has expired. For all that appears, they were bought in good faith, in the exercise of the best judgment of the officers then, and for railroad purposes, at a time when the company had a right and expected to build to them. The mortgage took effect upon them. That the expectations of business have not been realized, that the right to use them in direct connection with the road, without further legislative authority, has expired, does not relieve them from the incumbrance. They are claimed still, on grounds that the evidence would scarcely enable us to deny, to be necessary for the future development of the railroad. We could not say from the testimony that the purchase was, at the time, an extravagant and unreasonable one. The case of a railroad holding more property for its own purposes than its present needs demand, is entirely different from one in which the company buys other property, distinct from the road and its appurtenances, not intended or necessary for the present or prospective exercise of its franchise, and therefore not within the purview of the mortgage. We think there is nothing in the case to exclude the Crosby lots, or any part of the three lots in Bangor, from the effect of the mortgage, as property not therein intended to be acquired and conveyed.

The complainants in the first bill are entitled to an injunction against all the respondents named therein and in the amendment, restraining them from any interference with the complainants' possession and control, as mortgagees, of the real estate therein described, and from any resistance of the complainants' title to the same, to the extent of the trusts declared in the mortgage; the injunction to be made perpetual and without the limitation just stated, if the interest and title of the complainants has or shall become absolute by a legal foreclosure. The second bill is dismissed.

Decree accordingly.

APPLETON, C. J., VIRGIN, PETERS and LIBBEY, JJ., concurred. WALTON and BARROWS, JJ., did not sit.

The three cases above reported are valuable as contributions to the knowledge of a branch of railroad law which is still comparatively new, and as to which there is a decided dearth of authority.

The aim of this note will be to explain briefly the doctrines which obtain with reference to mortgages on after-acquired property. The validity of such mortgages, the right of railroad companies to execute them, and the property which will be deemed to pass by them—many of the cases upon these points will be found cited in the arguments of counsel, or in the opinions of the court, in the reports of the principal cases. They will, however, for the most part be cited herein anew in their appropriate places.

At common law, it is clear that no man can convey, either absolutely or by way of mortgage, property which he does not own, but expects subsequently to acquire. "*Qui non habet, ule non dat*," is a maxim persistently followed at common law; therefore a mortgage of after-acquired property is simply void and of no effect. *Jones v. Richardson*, 10 Metc. 481; *Bonsey v. Amee*, 8 Pick. 286; *Letourno v. Ringgold*, 3 Cranch C. C. 103; *Gardner v. Macewen*, 19 N. Y. 123; *Chapin v. Cram*, 40 Me. 561; *Pierce v. Emery*, 32 N. H. 484; *Hunt v. Bullock*, 23 Ill. 320; *Looker v. Pockwell*, 38 N. J. L. 253; *Wilson v. Wilson*, 37 Md. 1; *Hunter v. Bosworth*, 43 Wisc. 583; *Williams v. Broggs*, 11 R. I. 478.

In equity, however, a very different rule obtains. Mortgages of after-acquired property have their full force and effect given to them, and that from a very simple application of equitable principles. "If a vendor or mortgagor," said Lord Chancellor Westbury, in *Holroyd v. Marshall*, 10 H. L. C. 211, "agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. . . . Apply these familiar principles to the present case. It follows that immediately on the new machinery . . . being placed in the mill it became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor (the mortgagor) was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question."

"A court of equity," said Sharswood, C. J., in *Phila., Wil. and Balt. R. R. Co. v. Woelpper*, 64 Pa. St. 366, "will treat a mortgage of property to be subsequently acquired, whether it be real or personal, as a binding contract which attaches to the thing when acquired. Equity considers that as done which a chancellor would decree to be done. If, then, upon every acquisition of property within the description contained in the mortgage, a chancellor would decree the mortgagor to execute a mortgage of such subject it will be considered as though it had been done, and that of every article of property as acquired there was an actual mortgage then executed."

The principle of law enumerated in the extracts above cited is of comparatively recent origin. It is first clearly and definitely stated by Story, in *Mitchell v. Winslow*, 2 Story, 638, which was decided in 1843. "Here," said Story, "the true question is not whether the assignment of the property to be acquired in future is good at law, but whether it is good in equity. Upon the best consideration which I am able to give the subject, I think it is good and valid." Other decisions to the same effect speedily followed, and at length as early as 1859, the principle received the sanction of the Supreme Court of the United States, in *Pennock v. Coe*, 23 Howard, 117.

The following American authorities upon the point may also be consulted. *Phila., Wil. and Balt. R. R. Co. v. Woelpper*, 64 Pa. St. 366; *Covey v. Pitta*, *Ft. W. and Chicago R. R. Co.*, 3 Phila. 173; *Butler v. Rahm*, 46 Md. 541;

Williamson v. N. J. Southern R. R. Co., 29 N. J. Eq. 311; Scott v. Canton, 6 Biss. 529; Brett v. Carter, 2 Lowell, 458; Dillon v. Barnard, 1 Holmes, 386; Emerson v. European and N. A. Ry. Co., 67 Me. 387; Stevens v. Watson, 4 Abb. App. Dec. 302; Barnard v. Nor. and Worc. R. R. Co., 4 Cliff, 351; Willenock v. Morris Canal Co., 3 Green Ch. 377; Pierce v. Emery, 33 N. H. 484; Ludlow v. Hurd, 6 Am. Law. Reg. 493;

In England the same conclusion was not so early reached. Several authorities pointed to such a result, but it was not until the decision of the case of Holroyd v. Marshall that the law was deemed settled. In this case a decree was entered by Vice-Chancellor Stuart, affirming the validity of the mortgage. On appeal to the House of Lords, that decree was reversed by L. C. Campbell, 2 DeG., F. & S. 596. A reargument was, however, ordered, and in 1862 a decree reversing Lord Campbell was entered, Lord Westbury and Lord Wensleydale (Baron Parke) being of opinion that the mortgage was valid, though Lord Chelmsford dissented.

It seems to be clear that any railroad company having by its charter a general authority to mortgage its property, may execute a mortgage which will bind after-acquired property. Dunham v. Conn., Peru, etc., Ry. Co., 1 Wall. 254; Coopers v. Wolf, 15 Ohio St. 523; Ludlow v. Hurd, 1 Disney, 552.

The question of exactly what after-acquired property passes by a mortgage, depends in a very great degree upon the terms of the instrument. Some authorities may be found to the effect that a mortgage of the franchises and property of a railroad, without more, will be sufficient to pass all after-acquired property, on the ground that such after-acquired property is to be considered as an accretion to the property owned at the time of the mortgage. Dinsmore v. Racine and Miss. R. R. Co., 12 Wisc. 649; Farmers' Loan and Trust Co. v. Bank, 11 Wisc. 207; Pierce v. Emery, 33 N. H. 484.

But as a rule this principle does not obtain; some specific terms indicative of an intent to pass after-acquired property are usually required to be inserted in the mortgage. See as to the proper construction of clauses of this character, *In re Panama, New Zealand and Australian Royal Mail Co.*, L. R. 5 Ch. 318; Seymour v. Canada and Niagara Falls R. R. Co., 25 Barb. 284; Elwell v. Grand St. and Newtown R. R. Co., 67 Barb. 83; Meyer v. Johnston, 53 Ala. 287; Shaw v. Bill, 95 U. S. 10; Walsh v. Barton, 24 Ohio St. 28; Farmers' Loan and Trust Co. v. Cary, 18 Wisc. 110; Farmers' Loan and Trust Co. v. Bank, 15 Wisc. 424; Brainard v. Peck, 34 Vt. 496; Campbell v. Texas and N. O. R. R. Co., 2 Woods, 263; Barnard v. Norwich and Worcester R. R. Co., 14 Niles' Bank. Reg. 469; Farmers' Loan and Trust Co. v. Fisher, 114; Williamson v. N. J. Southern R. R. Co., 26 N. J. Eq. 398; Weetgen v. St. Paul and Pac. R. R. Co., 4 Hun (N. Y.), 529; City of Bath v. Miller, 53 Me. 308.

In this connection it should be mentioned, that subsequently acquired personalty will pass under the general terms of a railway mortgage, without special mention, if the terms of the mortgage be broad and comprehensive enough to cover it. State of Md. v. No. Cent. Ry. Co., 18 Md. 193; Pullan v. Cinn. and Chic. Air Line R. R. Co., 4 Biss. 85; Miller v. Rutland and Washington R. R. Co., 36 Vt. 452; Morrell v. Noyes, 56 Me. 458; Phillips v. Winslow, 18 B. Mon. 431.

In determining what property does and what does not pass, due regard must of course be had to the maxim, "*Expressio unius est exclusio alterius*." Brainard v. Peck, 34 Vt. 396.

Accordingly, in Walsh v. Barton, 24 Ohio State, 28, it was held that where a mortgage was executed by a railroad company on "the road, whether made or to be made, acquired or to be acquired, and on all property of the company, whether then owned or thereafter to be acquired, used or appropriated

for the operating or maintaining the said road," lands afterwards acquired by the company which were not used or appropriated for operating or maintaining the road were not covered by the mortgage. To the same effect in the case of Seymour v. Canandaigua and Niagara Falls R. R. Co., 25 Barb. 284.

The mortgage will of course attach upon all after-acquired property subject to existing liens at the time of the acquisition. Galveston R. R. Co. v. Cowdrey, 11 Wall. 459; United States v. N. O. R. R. Co., 12 Wall. 362; Willenk v. Morris Canal, etc., Co., 3 Green Ch. 377; Williamson v. R. R. Co., 29 N. J. Eq. 311.

If the after-acquired property be acquired through fraud, no rights will of course become vested in the mortgages paramount to those of the defrauded parties. Frazier v. Fredericks, 42 Ab. (N. J.) 162; Field v. Post, 9 Vroom (N. J.), 346.

On the question of effect of the consolidation of railroad companies which was raised in the principal cases, a few general principles may be stated. Companies having a chartered existence in different states may, by consent of their stockholders and by virtue of legislative enactment in both states, be amalgamated or consolidated. But the assent both of the stockholders and of the legislature is necessary to effect this result. Ex parte Era Life and Fire Ins. Co., 1 DeG. J. and Sm. 29; Clench v. Financial Co., L. R. 4 Ch. App. 117; Fisher v. Evansville and Crawfordville R. R. Co., 7 Porter, 407; Kean v. Johnson, 1 Stockt. Ch. 405; Chapman v. M. R. and L. E. R. and S. R. R. Co., 6 Ohio (N. S.), 119; State v. Bailey, 16 Md. 46.

A mere consolidation of the stock of two railroad companies will not merge the separate existence of the companies. Central R. R. and Banking Co. v. Georgia, 92 U. S. 665; Racine and Miss. R. R. Co. v. Farmers' Loan and Trust Co., 49 Ill. 381.

Where two railroad companies are consolidated, the property of each of the original companies remains liable in the hands of the consolidated company for all debts contracted by and incumbrances entered against the company to which the property has belonged prior to the consolidation. Prouty v. Lake Shore and Mich. South. Ry. Co., 52 N. Y. 363; Chase v. Vanderbilt, 62 N. Y. 307; Selma, Rome and Dalton R. R. Co. v. Harbin, 40 Ga. 76; Powell v. Northern Mo. R. R., 42 Mo. 63; Bruffett v. Gt. Western R. R. Co., 25 Ill. 353; Taggart v. Northern Cent. R. R. Co., 29 Md. 557; Western Union R. R. Co. v. Smith, 75 Ill. 496; Columbus, Chicago and Ind. Cent. R. R. Co. v. Skidmore, 64 Ill. 566; Columbus, Chicago and Ind. Ry. Co. v. Powell, 40 Md. 87; Arbuckle v. Illinois Midland Ry. Co., 81 Ill. 429; Chase v. Vanderbilt, 62 N. Y. 307.

GEORGE S. COE et al., appellants,

v.

THE DELAWARE, LACKAWANNA AND WESTERN R. R. Co. et al.,
respondents.

(84 New Jersey Equity, 266. June Term, 1881.)

A railroad company having filed a survey of a route over which another company also had filed a survey, having held such other company out as the builder of the track over such route, and having taken the benefit of a contract incident to the laying of such route, made in the name of such other company, cannot repudiate such contract, on the ground that itself is the builder of such road.

When a mortgage is given by a railroad company on its franchises and on its roads to be thereafter built, and a branch road, not in contemplation at the date of such encumbrance, is afterwards laid and built, such branch road will pass under such mortgage, subject to the burthens put upon it by the company in the course and as incidents of its acquisition.

ON appeal from a decree of the chancellor, whose opinion is reported in *Coe v. N. J. Midland R. R. Co.*, 4 Stew. Eq. 105.

Mr. Cortlandt Parker, for appellants, cited—

M. & E. R. R. Co. v. Central R. R. Co., 2 Vr. 209; *Moorehead v. Little Miami*, 17 Ohio, 340; *Blakeman v. Canal Co.*, 1 Md. 154.

Corporations can be bound by implied contracts to be deduced by inference from corporate acts, without either a vote, or deed, or writing. *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Bank of the United States v. Dumbidge*, 12 Wheat. 74; *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Fanning v. Gregoire*, 16 How. 524; *Abbott v. Hermon*, 7 Greenl. 118; *Frankfort Bridge Co. v. City of Frankfort*, 18 B. Mon. 41; *Peterson v. Mayor, etc.*, 17 N. Y. 449-453; *Fister v. La Rue*, 15 Barb. 323; *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. (N. S.) 484; *Ang. & Ames on Corp.* 216, 218 ch. VIII. § 8, and cases cited; *U. S. v. N. O. R. R. Co.*, 12 Wall. 364; *Williamson v. N. J. Southern R. R. Co.*, 2 Stew. Eq. 317, 319, 320, 321; *Fenner v. Lewis*, 19 Johns. 38; *Meade v. McDowell*, 5 Binn. 195; *Bigelow on Estoppel*, 578-588; *Phillipsburg Bank v. Fulmer*, 2 Vr. 52; *Den v. Baldwin*, 1 Zab. 395, 403; *Phillhower v. Todd*, 3 Stock. 312; *Morris Canal v. Lewis*, 1 Beas. 323; *Pickert v. Ridgefield R. R. Co.*, 10 C. E. Gr. 316; *Carpender v. Carpender*, Id. 184.

Mr. John W. Taylor, for respondents.

I. The appellants were not entitled to a specific performance of the agreement of October 16th, 1872, against the complainants.

II. The decree rightfully requires the appellants to pay the value of the land taken for the crossings, and the damages sustained in consequence thereof. *Coe v. N. J. Midland R. R. Co.*, 1 Stew. Eq. 27; *Williamson v. N. J. Southern R. R. Co.*, 2 Stew. Eq. 211; *Cortes v. City of Davenport*, 9 Iowa, 227; *Beyer v. Tanner*, 29 Ill. 135; *Hatfield v. Cent. R. R. Co.*, 4 Vr. 251; *Jersey City v. Montclair R. R. Co.*, 6 Vr. 328; *M. & E. R. R. Co. v. Blair*, 1 Stock. 635.

III. If the respondents are entitled to damages, etc., they are entitled to a reference to ascertain them.

IV. The mortgage of the respondents included the railway over which the right of crossing is claimed by the appellants. *Jones on R. R. Securities*, § 130; 1 *Jones on Mortgages* (2d ed.), §§ 155, 157; 2 *Redfield on Railways* (5th ed.), 503; *Green's Brice's Ultra Vires* (2d ed.), 235, and note A; *Seymour v. Canandaigua, etc., R. R. Co.*, 25 Barb. 284; *Meyer v. Johnston*, 53 Ala. 227, 330; *Willink v.*

Morris Canal Co., 3 Gr. Ch. 377; *Williamson v. N. J. Southern R. R. Co.*, 10 C. E. Gr. 13; S. C., 2 Stew. Eq. 311; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Pennock v. Coe*, 23 How. 117; *Dunham v. R. R. Co.*, 1 Wall. 254; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; *Pierce v. Emery*, 32 N. H. 484; *Mitchell v. Winalow*, 2 Story, 630; *Phillips v. Winslow*, 18 B. Mon. 431; *Elwell v. Grand St. and Newtown R. R. Co.*, 67 Barb. 83; *Pierce v. Emery*, 32 N. H. 484; *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465; *Stevens v. Watson*, 4 Abb. Ct. of App. Dec. 302; *Evansville and Crawfordsville R. R. Co. v. Dick*, 9 Ind. 433.

V. With respect to the remaining ground of appeal, viz., "that the said decree declares and decrees that the Hudson Connecting Ry. Co. had no title to or right in the right of way covered by said crossing," it is sufficient to remark:

1. That the appellants are not the Hudson Connecting Ry. Co., and cannot allege themselves to be "aggrieved" by this part of the decree, nor can they appeal therefrom. They can appeal only from such parts of the decree as affect them, and cannot call in question other parts of the decree in which they have no interest. 2 *Daniell's Ch. Pr.* (4th ed.) p. 1489, and note 2; *Idley v. Bowen*, 11 Wend. 227; *Hone v. Van Schaick*, 7 Paige, 222.

Mr. D. H. Chamberlain, of Maine, for respondents.

From this decree the present appellants appeal, for the following reasons:

1. Because the decree holds that the appellants are not, as against the trustees of the first mortgage, entitled to the specific performance of the agreement between the appellants and the Hudson Connecting Ry. Co., set up in appellants' cross-bill.

2. Because the decree holds that the appellants should be required to pay to the said trustees, as mortgagees, the value of the land taken by the appellants and for the crossings made by them of the tracks and right of way of the New Jersey Midland Ry. Co., and all damages sustained by the latter company and its mortgagees by reason of said crossings.

3. Because the decree refers it to a master to ascertain and report the amount of the value and damages, and reserves the subject for a separate supplemental decree.

4. Because the decree holds that the Hudson Connecting Ry. Co. had no title or right in the right of way covered by said crossings, and the mortgage to the trustees included the railway of the Hudson Connecting Ry. Co. over said crossings, and that the appellants' right in said crossings is to be considered as subject to the said mortgage to the trustees.

5. Because the decree orders a writ of fieri facias for the sale of the appellants' interest in said crossings; and orders the appellants to surrender possession to the purchaser at such sale.

I. As to the appellants' right to specific performance. Fry on

Spec. Perf. §§ 79, 103; *Vandyne v. Vreeland*, 3 Stock. 379; Fry on Spec. Perf. § 251; *Clarke v. Rochester, L. and N. R. R. Co.*, 18 Barb. 350; *Story's Eq. Jur.* § 750; Fry on Spec. Perf. § 252; *Vandyne v. Vreeland*, 3 Stock. 370, 381; *Johnson v. Hubbell*, 2 Stock. 332, 342; *McDavitt v. Pierrepont*, 8 C. E. Gr. 42; *Dickerson v. Colgrove*, 100 U. S. 578, 580; *Erie R. R. Co. v. Del., Lack. and West. R. R. Co.*, 6 C. E. Gr. 283.

II. As to that part of the chancellor's decree which requires the appellants to pay to the trustees the value of the land taken, and for the crossings made, and for all damages sustained by the Midland company and its mortgagees by reason of such crossings.

III. As to the title of the Hudson Connecting Ry. Co. to the right of way covered by the crossings in question, and as to the subordination of the rights of the appellants in the said crossings to the trustees' mortgage.

IV. If the several positions already maintained in this argument shall be regarded as correct, it will remain to inquire what is the attitude of the appellants toward the trustees, as mortgagees, upon the foreclosure of their mortgage. *Sedgwick on Meas. of Dam.* (7th ed.) [134] note (a); *Berry v. Vreeland*, 1 Zab. 183; *Van Schoick v. Del. & Rar. Can. Co.*, Spen. 249; *Readington v. Dilley*, 4 Zab. 210; *Som. & E. R. R. Co. v. Doughty*, 2 Zab. 495; *Trenton Water Power Co. v. Chambers*, 2 Beas. 199.

V. In respect to the remaining grounds of appeal from the chancellor's decree. *Chegary v. Scofield*, 1 Hal. Ch. 525; *Ryerson v. Boorman*, 3 Hal. Ch. 640; *Schenck v. Conover*, 3 Beas. 32.

The opinion of the court was delivered by

BEASLEY, C. J.—In consequence of the voluntary withdrawal of several of the parties to this appeal, but two questions are left for solution by this court, and those questions are, Whether a certain written agreement, made between the Hudson Connecting Company and the Morris and Essex R. R. Co. and the Delaware, Lackawanna and Western R. R. Co., has a legal existence, and, if so, what is its legitimate interpretation, bearing date 16th of October, 1872. The substance of this agreement is, that the Morris and Essex R. R. Co. should permit the Hudson Connecting Company to construct its railway over that of the Morris and Essex, and, as an equivalent, that the latter company should have the right to cross the track of the former.

This contract is drawn into controversy in this wise: George S. Coe, as trustee of certain bondholders of the New Jersey Midland Ry. Co. is the original complainant in these proceedings, having filed his bill to foreclose a mortgage given to him by that company as a security of the bonds just mentioned. To that suit the Delaware, Lackawanna and Western R. R. Co., as the lessee of the Morris and Essex, were joined as a party. This latter company, during the pendency of these proceedings, attempted to construct its line of

road by force of the agreement just referred to, over the line of the road which it insists is the property of the Hudson Connecting Company, and such effort having been resisted, it filed its bill for a specific performance of the stipulation in question. To the claim thus set up, the complainant Coe, as trustee, denies the ownership of the Hudson Connecting Company to the line of railroad embraced in the agreement, and avers that this portion of the railroad track was laid out, constructed and paid for by the New Jersey Midland, and consequently that it passed under the trust mortgage. The circumstances relating to the controversy with respect to the title to this portion of railroad track are multiform and numerous, and they will be found detailed with fulness and accuracy in the opinion read in that case by the chancellor. From the view which I shall express touching the questions involved, it will not be necessary for me to recapitulate such facts with minuteness. The following outline will suffice to render the grounds of the conclusions arrived at by me perspicuous:

The trust mortgage held by the complainant is dated 1st of August, 1870, and at that time, and up to the spring of 1871, the New Jersey Midland Ry. Co. designed to reach the Hudson River by a direct route, but on account of the expense, found such purpose impracticable, and therefore formed the plan of attaining the desired terminus by means of a connection with the Pennsylvania R. R. Co. In furtherance of this design, on the 12th of July, 1871, it filed a location of what it called its branch line, in its survey, from a point near Bellman's creek, to the Pennsylvania railroad, at West End. This route was identical with a survey laid by the Hudson Connecting Company, part of which had been laid before and part after that of the Midland. But this interference between these surveys was practically of no moment, as both these companies were under the same management. Under these circumstances, the Midland began to acquire the land necessary for this route, but in a proceeding to condemn lands, having been defeated on the ground of a want of power to lay the route in question, the agents in charge of the affair determined to lay such route in the name of the Hudson Connecting Company. Accordingly this was done, the New Jersey Midland taking the title to such pieces of land as were obtained by agreement with the owners, in its own name, the residue of the land being condemned by proceedings in the name and under the charter of the Hudson Connecting Company. In order to help pay the cost of the construction of this line of road, bonds have been issued by the connecting company to the amount of \$400,000, which were secured by a mortgage on its road and franchises. Part of these bonds were given to the Midland, and part to the Montclair railroad, a tributary of the former, and which, in this matter, was acting in concert with the former company. The line thus built was paid for in part by the Midland. The road

having been built in this way, and the facts having been laid before the board of directors of the Midland, that body passed a resolution directing the title to the lands embraced in the route to be conveyed to the Hudson Connecting Company. That step was accordingly taken, the conveyance bearing date the 16th of October, 1873, and shortly afterwards the Midland took a lease of the road. These facts do not seem to me to be disputable. But the contention of the complainant is, that the proceedings of the agents of the Midland in acquiring this route by force of the charter of the Hudson Connecting Company, and for the uses of such company, was beyond the province of their agency, and that such a course of proceeding was, at the time, neither known to nor sanctioned by the body of directors of the Midland, and that when such board did subsequently sanction these steps, such ratification was void, as respects the complainant being a prior mortgagee. With respect to the condemnation of lands made by force of the charter of the Hudson Connecting Company, the position is, that in that matter the charter of that company was used merely as a means to an end—that is, to the acquisition of such lands by the Midland. Such a view appears to involve the proposition that if an agent, in good faith and in the belief that it is best for the interests of his principal, departs from his instructions and does an act not authorized, and the principal becoming aware of such act, in good faith ratifies it, such ratified act is not binding; and also the further proposition that a corporate body, possessed of right of eminent domain, can lawfully transfer such right, in its own discretion, pro tanto, to another corporate body. These propositions seem to underlie the position of the complainant with regard to the general aspects of this case. But as I think the matter now before the court can be settled without discussing or considering this position, I shall not express any opinion respecting it; nor shall I undertake to decide the further question whether this branch road is embraced in the description of the provisions contained in the complainant's mortgage—a question so ably discussed in the brief of the counsel of the appellants, for a solution of these questions is not necessary to the theory of decision which appears to me at present to be applicable.

That theory is that this respondent, the trustee, is not in a position to call this contract in question. If we assume the attitude of the respondent with respect to the ownership of this line of road here in dispute, and hold that such ownership resides in the Midland Ry. Co., it is impossible to deny that in the acquisition of such roadway the Hudson Connecting Company was used as an agent by the managers of the first-named corporation. The title to lands has been extorted from unwilling land-owners in the name of the Hudson Connecting Company, for the benefit of the Midland. In his answer, the trustee is obliged to admit that a right to cross the Erie

Ry. was acquired for the benefit of the Midland by the Hudson Connecting Ry. Co. In addition to these acts, in April, 1872, the route of the road-bed in dispute leading across the road of the Morris and Essex, the agents of the Midland took proceedings to obtain a right to such crossing by condemnation in the name of the connecting company, such measure being, as it is now claimed, for the use of the Midland, and thereupon an agreement in writing was entered into between the Morris and Essex R. R. Co. and the Hudson Connecting Company, whereby a crossing was acquired, which up to the present time has been in the full possession and use of the Midland. The contract thus made, as it is claimed, for the benefit of the Midland, was never dissolved by that company, even at the time of the filing of this bill. It was under these circumstances that in the fall of the same year the contract now in dispute was entered into. It will be remembered that this latter contract was likewise in the name of the connecting company, and by it a right was given to that company to lay its crossing for the use of the Montclair road over the Morris and Essex. The evidence shows that in laying this disputed piece of road the Midland and the Montclair railroads were acting in concert, each having received a portion of the bonds issued by the Hudson Connecting Company. In the light of the evidence it is impossible to deny that the New Jersey Midland R. R. Co. was a party or privy to both these agreements, and both of them, in the most impressive manner, held out to the Morris and Essex that the line of road in question was being built by the Hudson Connecting Company. Under such conditions it does not seem to me of the least importance, so far as the present controversy is concerned, which corporation, in point of fact, was the real builder of this part of road, if it was the Hudson Connecting Company. Thus, plainly, the contract now under consideration is clearly valid, and so it seems to me it is plainly valid as against the respondent, even on the opposite assumption as to ownership, inasmuch as in all these transactions the Hudson Connecting Company was held out by the Midland as the builder and owner of the road. The chancellor, in his opinion, says that

"The connecting company merely lent its charter powers of condemnation to the latter [the Midland] to be used if and when necessary to effectuate the purpose of the latter, in the execution of which it then was, and for a considerable length of time had been engaged—the construction of its railroad from Bellman's Creek to West End. That was the end and aim of the project of using the connecting company's charter, and the sum and substance of the whole matter."

It will be observed that no one act in the progress of the transaction thus described could be done without presenting, in the most imposing form, this connecting company as the builder of this line of road; and after carrying into effect such a project, and taking

into its possession the track thus acquired, it is quite too late for the Midland R. R. to attempt to repudiate a contract honestly entered into with the connecting railroad, in the orderly prosecution of such project.

And in such a respect as this it is an error to assume this respondent, as the mortgagee of the Midland, stands in a better position than his mortgagor. The fallacy of such a position arises from overlooking the circumstance that this mortgage, so far as we are now concerned, relates to a railroad track to be acquired and constructed after its execution. This particular road was not in contemplation, even, when this mortgage was given, and it is obvious that it must pass to the mortgagee with the burdens incident to its acquisition. All the property and rights acquired by the mortgagor enure to the benefit of the mortgagee; but nothing can be claimed by the latter beyond this.

The right to cross the Morris and Essex was a beneficial interest added to the value of the mortgaged premises; the equivalent for such right was the privilege of crossing such newly-built track by the former company. Such privileges and encumbrances were the usual and all but necessary arrangements incident to the laying of a railroad route, and they inseparably annex themselves, partly as an advantage and partly as a disadvantage, to the property in the railroad, and in that way inevitably qualify the interest that comes to a prior mortgagee in such premises. The contract in question cannot be repudiated by this trustee—the property came to him cum onere.

Having thus concluded that this agreement is legally efficacious to hold all parties in interest to its terms, the next inquiry is as to its meaning and legal effect.

As I have said, this contract first gives to the Hudson Connecting Company the right to cross the track of the Morris and Essex at a certain point; it then stipulates in these words:

“Third. That if at any time hereafter the said parties of the first part [The Morris and Essex and the Delaware and Lackawanna] or either of them, shall desire to change the line and grade of the main line of the Morris and Essex R. R., or of the Boonton branch railroad, or both of them, as to make it necessary to cross the said railway of the said party of the second part, which, under this agreement, is to be constructed over the Morris and Essex R. R., or the railway which, under the said agreement of April 3d, 1872, had been constructed by the said party of the second part over the said Morris and Essex R. R., or over both of said railways, they, the said parties of the first part, or either of them, shall have the right, without charge, to cross either or both of said railways of the said party of the second part, over, under or at grade, and the said parties of the first part, or either of them, may occupy

and use without charge so much of the lands of the said party of the second part as may be necessary for that purpose."

By force of these stipulations, the Delaware, Lackawanna and Western R. R. Co. claims the right to cross the track in question at a point where it runs through a piece of land about eighteen hundred feet long, used for terminal purposes and as a drill-yard. The question is, whether such a right has been conferred upon this company by virtue of this contract, the substance of which has been above quoted.

In my opinion, such a claim is a most extravagant one. I find such a signification neither within the literal terms of the agreement, nor sustained by any reasonable supposition as to the intention of the parties. The contract, in words, gives the right "without charge, to cross either or both of said railways, and to occupy and use, without charge, so much of the lands of the said party of the second part as may be necessary for that purpose." The whole privilege here granted is the privilege to cross the track, and to occupy and use the land necessary for that purpose; but this right of passage does not embrace anything but the railroad track, and the land appertaining to such track. It would be altogether unreasonable to deduce from such terms as these, that it was the understanding of these parties that this railroad company should have the enormous privilege of crossing with its road not only the track of the other company, but also over all lands and structures used in connection with its road. Is it rational to assert that the Morris and Essex Company, when it entered into this compact, understood that it was to become vested with the right to construct its road, without charge, through the workshops of the other contracting party, or through its depots, however costly? And yet, such must be the right if the construction contended for is to prevail—and surely a right so exorbitant and oppressive cannot be raised up out of doubtful terms. It may well be doubted whether a power so unnecessary, so destructive of all fairness and equality in the bargain, could be enforced, except by the use of terms so clear and specific as to leave no room for speculation as to what was meant on the one side and on the other. The conventional privilege to cross the track of this company does not comprehend and carry with it the right to cross, without charge, its drilling-yard. So far, therefore, as the mere crossings of this main track at the points in question are concerned, the Delaware and Lackawanna R. R. Co. is entitled to do such act without charge; but so far as it crosses lands used for other purposes than that of its main railroad track, it must make a reasonable compensation, to be ascertained in the usual manner. The result therefore is, that in this respect the decree should be reversed, and the contract in question, construed in

the sense above indicated, should be decreed to stand confirmed in all respects, and to be specifically performed.

Neither party should be allowed costs in either court.

THE MIDLAND R. R. Co., Appellants,

v.

ANNA L. HITCHCOCK, Respondent.

(34 *New Jersey Equity*, 278. *June Term*, 1881.)

The complainant was the holder of a first mortgage bond of the defendant, and agreed to come in under a plan to re-organize the defendant by force of the statute; the bill alleged that the defendant, as re-organized, was about to issue to the other holders of such first mortgage bonds, its own bonds, but did not show that such new bonds were to be secured by a mortgage. *Held*, that such statements did not lay a ground for equitable jurisdiction.

But as the bill alleged that defendant would not disclose to complainant what the plan of re-organization was, *held*, further, that the right of such discovery laid a sufficient foundation to the suit.

On appeal from a decree of the chancellor, whose opinion is reported in *Hitchcock v. Midland R. R. Co.*, 6 *Stew. Eq.* 86.

For the facts of this case, see the chancellor's opinion reported in 6 *Stew. Eq.* 86.

Mr. John W. Taylor, for appellants.

I. There is a want of equity in the bill.

"An allegation in the bill that the plaintiff 'is informed,' or that he 'is informed and believes' that a certain material fact exists, is not a sufficient allegation of the existence of such a fact." *Cameron v. Abbott*, 30 *Ala.* 416; *Lucas v. Oliver*, 34 *Ala.* 626; *Walton v. Westwood*, 73 *Ill.* 125.

"But the fact should be positively alleged by the plaintiff in his bill." *Story's Eq. Pl.* (9th ed.) § 241, and note (a); *Egremont v. Cowell*, 5 *Beav.* 620-623; 1 *Dan. Ch. Pr.* (5th *Am. ed.*) *360; *Lord Uxbridge v. Stareland*, 1 *Ves.* 50-56; *Quinn v. Leake*, 1 *Tenn.* Ch. 71.

II. The complainant has an adequate remedy at law.

III. The complainant should have made the Central Trust Company and the present holder of the bond parties defendant, in order to equitable relief. By the complainant's bill, the Central Trust Company appears to have the custody or possession of the bond, and it should certainly be made a party.

Mr. Geo. R. Brown, for respondent.

I. As to want of equity. *Story on Agency* (8th ed.), 109, § 85; *Jeffery v. Bigelow*, 13 *Wend.* 518; *Story on Agency*, § 127; *North River Bank v. Aymer*, 2 *Hill*, 375; *Johnson v. Jones*, 4 *Barb.* 369; *Van Hook v. Somerville Manuf. Co.*, 1 *Hal. Ch.* 633; *Gulick v.*

Vroom, 2 Vr. 182; 5 Vr. 463; *Nicholson v. Janeway*, 1 C. E. Gr. 285; *Law v. Stokes*, 8 Vr. 249; *Hunter v. Hudson River I. & M. Co.*, 20 Barb. 493; *Medbury v. Erie R. R. Co.*, 26 Barb. 564; *Dunning v. Roberts*, 35 Barb. 436; *Witbeck v. Schuyler*, 44 Barb. 469, 31 How. Pr. 97; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599; *North River Bank v. Aymar*, 3 Hill, 362; *Farmers' Bank v. Butchers and Drovers' Bank*, 14 N. Y. 627; *Griswold v. Haven*, 25 N. Y. 565; *Exchange Bank v. Monteith*, 26 N. Y. 506; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *President, etc., v. Comen*, 37 N. Y. 320; *Armour v. Mich. Cent. R. R. Co.*, 65 N. Y. 111; *Welsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Walsh v. Gilbert*, 2 Hun, 58.

II. Defect of parties. The bill makes all persons parties who had or appeared to have any possible interest in the matter; it includes the individual members of the re-organization committee, and the new company formed under the plan of re-organization. There is no allegation in the bill showing any other person having an interest; on the contrary, the complainant is the only person who has.

III. Remedy at law. The complainant clearly had no remedy at law. She had only an equitable interest in the property and franchises of the New Jersey Midland R. R. Co. or the proceeds thereof. The property sought to be reached in this suit, so far as we know, is not in existence. A bond of the new company "to be issued" in the place of those in the old. The old bond was deposited for a certain purpose—that purpose, to obtain a new bond.

The opinion of the court was delivered by

BEASLEY, C. J.

I agree with the chancellor in the view which he takes of the merits of this case as the same are stated in the bill.

My only difficulty has been with respect to the equitable foundation of the proceeding. The facts are detailed in the opinion of the chancellor. The bill is clearly defective, as it leaves it greatly in doubt whether or not the bond which the complainant claims the right to have issued to her by the company is a bond that is to be secured by a mortgage. If this, in point of fact, be the case, then it is plain that on this ground the matter in dispute is one for equitable cognizance. But if, on the other hand, the obligation on the part of the railroad company is to deliver a naked bond, unsecured in any way, to the complainant, in consideration of the bond surrendered to it by her, then it seems plain to me that a suit at law would be the only remedy. In such latter instance, an actual breach of the implied contract would afford the complainant plenary redress. But although this bill is thus deficient in this particular, nevertheless there is an indication in it that the bond in question is a mortgage bond, for in the charging part it charges that the complainant is entitled to "a mortgage bond of the said Midland com-

pany," in lieu of the one surrendered by her. Yet, such a charge standing isolated in the bill, without being supported or justified by any precedent statement, would not sufficiently exhibit the existence of a jurisdictional fact. I am not able to see how the cognizance of equity over the case can be sustained on this ground.

However, I have come to the conclusion that it was proper to sustain this bill against this demurrer, for the reason that the complainant has a right to a discovery of the plan on which the new company was re-organized. In her bill, the complainant alleges that the committee or trustees entrusted with the carrying out of the plan or agreement of re-organization, approved of an assumption, compromise or settlement of the debts, claims or liabilities of the said New Jersey Midland R. R. Co., but upon what particular or general terms they refuse to inform this complainant. It is clear, I think, that the complainant is entitled to this information, and it is also clear that this court cannot say whether her rights are legal or equitable until such discovery shall have been obtained. It is highly probable that the holders of the first mortgage bonds of the old company were to have similar bonds from the new company, and if such was the plan on which the new company was to be constituted, then, as has been said, the complainant has presented her case to the appropriate forum. This right to a discovery affords a basis on which this proceeding may be rested. I shall, therefore, vote to affirm the decree.

Decree unanimously affirmed.

CUMMINGS

v.

PITTSBURGH, CINCINNATI AND ST. LOUIS RY. CO.

(92 *Pennsylvania Reports*, 82. November 17, 1879.)

A lad who was employed by a coal dealer was engaged in unloading cars standing upon a siding constructed by the dealer upon his own land. By reason of the neglect of the railroad employees to change the switch leading to the siding from the main track, several cars were propelled from the main track upon the siding and colliding with the cars on which the lad was employed, he received injuries from which he lost his leg. In a suit against the railroad company for damages. *Held*, that the lad was employed on or about the company's road within the very terms of the Act of April 4th, 1868, and could not recover.

Mulherrin v. Delaware, Lackawanna and Western Railroad Co., 81 P. F. Smith, followed.

November 7th, 1879. Before Sharswood, C. J., Mercur, Gordon, Paxson and Trunkey, JJ. Sterrett and Green, JJ., absent.

Error to the Court of Common Pleas, No. 2, of Allegheny county: Of October and November Term, 1879, No. 328.

Case by Daniel Cummings, by his father, John Cummings, against the Pittsburgh, Cincinnati and St. Louis Ry. Co., to recover damages for an injury to said Daniel Cummings, whereby he lost his leg.

The lad, who was about fourteen years of age, was caught and crushed between two coal cars in the coal yard of Morris McCue. At this same point there are several coal yards which are supplied with coal brought in cars on the defendant railway.

The ground on that side of the railroad at this point is about eight to ten feet lower than the railroad. The coal cars are run into the coal yards upon switches and short tracks running out into the coal yards upon frame trestle-work, and the coal is unloaded by drops, in the bottom of the cars, which are unfastened and the coal dropped down through the trestle-work into the coal yard. There are between the points named two main tracks of the railroad; then alongside and east of these main tracks there is a side track, which side track is located, partly on the ground of the railroad and partly on the ground of the owners of the coal yard. This side track was put in by the railroad, but a part of the cost of the same was assessed upon the owner of each coal yard connected with it.

From this side track there are switches and tracks running into each coal yard. These short tracks are upon the private property of the owners of the coal yards, and were constructed by themselves upon the trestle-work, as above stated. The owner of one of these coal yards is Morris McCue. He owns mines on the line of the railroad. His coal is loaded into cars of his own at the mines and then brought in by the defendant railroad company, on its road, by its locomotives and employees, to his coal yard in the city. When the train with the coal cars arrives it is changed, by a switch, from the main track to the side track, above mentioned; then it passes along the siding until near McCue's siding, when that switch is also turned and the cars are run from the coal siding on McCue's private track. The locomotive does not follow on this private track into the coal yard, but at this point it gives the cars a shove or a shot and drives them back on the coal switch by means of the force thus applied by means of the locomotive.

Located adjoining and east of McCue's coal yard is the coal yard of the National Coal Company.

On the 4th day of June, 1878, a locomotive in charge of the employees of defendant company, with a train of about twelve coal cars, came into the city over the railroad. Of the cars in this train six belonged to McCue and the balance to the National Coal Co., and were to be delivered upon the sidings or tracks in these two coal yards.

The twelve coal cars were in front and pushed by the locomotive

in the rear. The train switched off upon the side track, ran opposite to McCue's yard, uncoupled the six cars of McCue, gave them a shove and sent them back upon McCue's siding, in his coal yard, and then ran back towards Second avenue until clear of McCue's siding, and stopped; then came ahead fast, intending to pass McCue's coal yard and shove or shoot the other six cars upon the siding of the National Coal Company. When the locomotive and train drew back from McCue's siding it was the duty of those in charge of the train to change the switch at McCue's so as to direct and send the train, on its return, past McCue's siding and upon the siding of the National Coal Company.

But this was neglected; the switch was not turned; and when the coal train returned it ran back again upon McCue's switch and collided with the cars there previously left, and broke and wrecked several of said cars and threw them down on the trestle-work.

The business of this boy, the plaintiff, was to mount the cars, after the drops in the bottom were opened, and push the coal in them to the opening in the centre. He and his employer, McCue, had just mounted the next to the rear car for this purpose, when the collision took place. McCue sprang down upon the coal below, but the boy was caught between the fragments or parts of the car, and fell, with the debris, down upon the coal below; his leg was crushed and was amputated shortly after. This action was brought for the injury thus sustained, and the cause of action against the defendant was the alleged carelessness and negligence of the defendant's employees in again running their train back into McCue's coal yard with great force and violence, and with neglecting to turn the switch and thus guide and direct the train to its proper destination on the tracks of the National Coal Company.

The plaintiff having proved the above facts the defendant moved for a nonsuit for the following reasons:

"That taking all the evidence to be true as testified to on behalf of plaintiff's witnesses it discloses nothing more than a case of an employee injured in and about the work of a railroad company. The evidence shows that at the time Daniel Cummings was injured he was in the service of the coal company. And by a contract and arrangement between McCue and the railroad company by which coal was to be delivered in the coal yard over sidings, which was upon the ground of McCue and others, connecting with the main track of the company. And under this contract or arrangement which was used in common as a place for the delivery of coal, was a coal depot connecting with the railroad, and as such under the Act of 1868, parties connected in and about the depots and tracks of the railroad company in a business of this kind cannot recover against the common employer."

The court sustained the motion for the nonsuit. A motion was

subsequently made in the court in banc to take said nonsuit off, which was refused. The plaintiff then took this writ and assigned this action for error.

Barton & Sons, for plaintiffs in error.—In the [court below the defendant relied on Kirby v. R. R. 26 P. F. Smith, 506. A very superficial examination of that case shows that it does not rule this one. Kirby, when injured, was on the cars of the railroad on the side track of the railroad, actually on the company's ground. The coal railroad did not connect, but ran alongside above grade, and the coal was run down chutes from the cars of the coal company into the cars of the railroad. Kirby was loading coal into the railroad company's cars. Cummings, the plaintiff, was on the cars of McCue. The cars were on the siding of McCue, and the siding was on his property at a time when all connection was or should have been cut off. The cars of the defendant and its employees had no authority to be there then more than merely to go past, and by their own negligence in not turning their switch, ran off their course, and into the private property of another.

The Act of 1868 is a sufficient innovation upon the rights of the people without extending it any further than the words will bear. It is confined to those injured while employed in or about depots, or in or upon any car or train therein or thereon. That is upon a car or train of the railroad company on its railroad or in its depot. The boy was not employed in or about a railroad depot. He was simply unloading coal in the coal yard of a private citizen from a car that had passed all the perils of railroad and depots.

Hampton & Dalzell, for defendant in error.—Counsel for plaintiff seek to distinguish Kirby's case from this, by saying that there the cars were the railroad company's, and the siding on the company's ground, while in this the cars were McCue's, and the switch on his ground. To maintain such distinction is to fritter away the statute. If the party is injured while lawfully employed about a railroad company's road or works, it matters not on whose car he may be, or whether on any car, he is within the express letter of the statute. That construction which makes the defendant's liability depend upon a difference of a few feet in distance, is wholly inconsistent with the plain intent of the statute, which was to put all persons subject to risk from railway operation on the same footing, whether they were in the actual employ of the company causing the injury or not. Hence the language used: "On or about the roads, works, depots and premises."

But so far as the plaintiff's rights are concerned, he may be said to have been on the defendant's road or premises. The company not only had a right, but it was its duty, to run cars over the McCue switch and into his yard. It was its switch for the purpose of moving trains over it to deliver coal.

The argument of plaintiff is not new. It is the same that was made and disposed of in *Mulherrin v. Del., L. and W. R. R. Co.*, 31 P. F. Smith, 376.

The judgment of the Supreme Court was entered November 17th, 1879.

PER CURIAM.—This case is not distinguishable from *Mulherrin v. Delaware, Lackawanna and Western R. R. Co.*, 31 P. F. Smith, 366. The side track here, though upon the property of the plaintiff's employee, was nevertheless used by the defendant and by his license. The plaintiff below was therefore employed on or about the defendant's road, and within the very terms of the Act of 1868. Judgment affirmed.

ANN HAMILTON v. G. H. AND S. A. RY. CO.

(54 *Texas Reports*, 556. March 29, 1881.)

In a suit for damages against a railway company by a mother for killing her minor son, whilst in its employment as a brakeman, the court excluded her testimony to the effect that she remonstrated with the son about his acting as brakeman, and also her answer to a question asking her what she said on that subject. *Held*—

1. The mother having already testified that she had not at any time consented to his employment, what she said to him would have been immaterial as to the fact of consent, and inadmissible to charge the company with notice of her objection, because not made in the presence or with the knowledge of any of its officers.

2. If the issue had extended to her entire conduct during the employment, and the inference reasonably drawn therefrom, the fact of her remonstrance with the son, and the manner thereof, would have been proper as explanatory of her conduct.

A railway company contracted with a boy fifteen years old for his services as brakeman on its railway without the consent of the mother, his only living parent. *Held*—

1. The employment was a wrong done the mother.

2. Unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been, the contract with him would not place him in the position of an employee or preclude a recovery for injuries suffered from the negligence of co-employees.

Though a minor may be of sufficient age and discretion to justify his employment as a brakeman, whether he could be thus properly employed or not, is a question for the jury.

See statement and opinion for facts which did not justify a charge of the court in regard to the employment of a minor as a brakeman on a railway.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

Suit by Ann Hamilton against appellee for running its cars over Nathaniel Brown, aged fifteen years, only son of plaintiff, and kill-

ing him; alleging that Nathaniel Brown was employed by the company without the consent and against the will of plaintiff; that he was a minor of tender years, and employed at extra hazardous business by defendant—coupling and uncoupling cars; that his death was caused by the gross negligence of defendant, its servants, agents and employees, and by no fault or want of proper care of the minor; that defendant was guilty of gross neglect in not having a skilful and competent engineer and yard master on the train, in not having the train properly manned, and in having defective switch and rails.

The defendant pleaded the general issue; that the action accrued to plaintiff more than three calendar months before the bringing of the suit; that Nathaniel Brown was employed by the defendant, with the consent of his mother, Ann Hamilton; that his business was to couple and uncouple cars, attend switches and give and repeat signals; that Nathaniel Brown was killed while in the employ of defendant, by getting his foot caught in the switch, and being run over by the cars of defendant company, and without fault or negligence on the part of defendant or his employees; that the train was well manned, and that the employees of defendant were careful, competent and well skilled in their duties.

Ann Hamilton testified, among other things, that she was the mother and only surviving parent of Nathaniel Brown; that her said son was killed on defendant's railroad; that he was a minor, aged fifteen years and seventeen days; and that she never, at any time, directly or indirectly, gave her consent to his employment by defendant as an employee on their railroad; and during the time he had been working for defendant she was sick and confined to her house, but that, looking through her window, she saw her son on the trains and cars of defendant; and being asked by plaintiff's attorneys to state whether she made any remonstrance to her son for working on said road, she said, "I did." Counsel for defendant here objected to the question and answer, and asked that they be excluded from the jury; court sustained the objection and excluded the answer from the jury, to which rulings plaintiff took bill of exceptions. She testified that Nathaniel Brown was unmarried and had no child; that she was sick during all the time her son was with the railroad; that her bed was by the window, and she saw her son on the cars of defendant.

Haley, yard master of defendant, testified that he knew Brown; that he was the son of the plaintiff; that he was killed by the defendant's railroad on 10th of February, 1873; that he was in the employ of the company, and had been in their employ about two weeks; and that Brown could not have avoided the accident by the exercise of prudence.

H. Hughes testified for defendant that Mr. Nichols instructed Mr. Haley, yard master, that he must not keep the boy, Nathaniel

Brown, in his employ without his mother's consent, and in a few minutes Brown came up and told Mr. Haley he had his mother's consent to the employment; and that after the death of Brown his mother received his wages.

While Mrs. Hamilton was being examined, she testified that at the time her son went into the employ of defendant she was confined to her bed by sickness, and had not been able to leave the house up to the time her son was killed by the road; that her house was within two and three hundred yards of the road; and that during her sickness her bed was by the window; that she saw from the window that her son was in the employ of the defendant by seeing him on the cars; but that she never, at any time, gave her consent, directly or indirectly, to his employment by the defendant.

On cross examination, defendant's counsel asked her "If her son did not tell her that he was employed by defendant as a brakeman." To which the witness answered, "yes." Plaintiff's counsel then asked witness to state the whole of the conversation between her and her said son at the time he told her that he was in defendant's employ. Defendant's counsel objected. The court sustained the objection, and refused to let the witness state the whole conversation, to which ruling plaintiff took bill of exceptions.

The evidence disclosed the following additional facts: Deceased was killed by defendant company's cars in charge of engineer James Long. Haley, yard master, whose duty it was to control the movements of trains, had gone to the depot to attend to freight bills; deceased came to the train and told Long that Haley wanted the empty cars detached from the train and thrown off the track on a switch; the train consisted of a car loaded with cotton and an empty car. For the purpose of executing the order, deceased went in between the empty and loaded car to uncouple the cars, and while thus between the cars he gave the usual signal with his hand to back a little so he could get the bolt out. The engineer put the engine in motion and moved it about six or eight feet, when he discovered by bumping of loaded car that it had run over deceased, and he died in an hour afterward from the injury. The reason the engineer moved the car so far was for the purpose of giving force enough to throw the empty car on the switch; moving the car an inch would have been sufficient to loosen the bolt; the car could have moved that little, and he understood by the signal that he was to move but a little; and deceased had been in the employ of defendant about two weeks.

Frank M. Spencer for appellant.

Waul & Walker for appellee.

I. The court properly ruled out the statement of plaintiff that she remonstrated with her son for working on defendant company's railroad, the question being leading and suggestive of the answer,

and not made in the presence or brought to the knowledge of the company.

II. Counsel cannot silently acquiesce in a question propounded to the witness by the opposite side, take the chance of the answer being in his favor; but finding it pertinent to the issue and against him, then have it excluded from the jury, and the court erred in allowing it to be done. *Kerr v. McGuire*, 28 N. Y., 446-452; *King v. Haney*, 46 Cal., 560.

III. The appellee would not be liable for the death of deceased if produced by the negligence of the engineer, provided there was no negligence proved in his appointment, or notice of his incompetency, and he was retained in his position thereafter. *Railroad Co. v. Miller*, 51 Tex., 274; *A. W. Robinson v. Railroad*, 46 Tex., 540; *Railroad Co. v. Fort*, 17 Wall. 553; *Wood's Master and Servant*, sec. 416; *Wharton on Negligence*, sec. 224; *Shearman & Redfield on Negligence*, secs. 86-88.

IV. A parent by whose consent, express or implied, a minor son has been employed, cannot recover from the employer under such circumstances as would prevent the recovery if the deceased was emancipated. *Railroad v. Miller*, 51 Tex., 274; *Shearman & Redfield on Negligence*, 50-97.

GOULD, ASSOCIATE JUSTICE.—The exclusion of the plaintiff's testimony that she remonstrated with her son about his acting as brakeman, and of her answer to a question asking her what she said to him on the subject, would not have been erroneous, had the issue on that point been merely whether she consented to her son's employment or not. Having testified positively that she had not, at any time, directly or indirectly, given her consent to his employment, what she said to her son on the subject would have been immaterial as to the fact of consent, and inadmissible for the purpose of charging the company with notice or knowledge of her objection, because not made in the presence or with the knowledge of any of its officers.

If, however, the issue was to extend to her entire conduct during the employment, and the inferences which might reasonably be drawn therefrom, we think that the fact of her remonstrance with her son, and the manner in which she remonstrated, might well have been admitted as tending to explain more fully what her conduct was.

But we are of opinion that the court erred in that part of its charge which related to the conduct of plaintiff, as follows: "Or if you believe that the plaintiff's conduct in the control of her son and in her knowledge of his occupation was such as to induce a reasonable man to believe that the plaintiff did consent for her son so to contract," etc. This part of the charge was objected to, and the point reserved by bill of exceptions.

We see nothing in the evidence justifying that charge. During the entire two weeks of her son's employment as brakeman, the mother was sick and confined to her room. No reasonable man, knowing the facts, would have felt authorized to act on the belief that the son had the mother's consent, nor do we think there was evidence tending to show such conduct, sufficient to support a verdict against plaintiff on that issue. Yet, looking at the final part of the court's charge, we are forced to the conclusion that the verdict of the jury must have been based on their finding against plaintiff on this issue. That part of the charge left them no alternative but to give plaintiff a verdict, unless they found that she had actually consented to the employment, or so conducted herself in reference to her son's occupation, as to induce a reasonable man to believe that she did consent; for that the boy "was placed in a position of danger, and received thereby an injury from which he died," were facts clearly apparent. That the position of brakeman is one of danger is a matter of common knowledge, requiring no proof, and it was not denied that plaintiff's son was placed in that position by defendant's servants, and received thereby an injury from which he died. The plaintiff's testimony that she never, directly or indirectly, consented to the employment, stood uncontradicted and uninvalidated in any way. That she, after her son's death, received his wages, seems to us to be of little significance. We think it apparent that the jury were misled by the charge of the court into giving undue weight to plaintiff's conduct, or failure to notify the company of her dissent, whilst she was sick and confined to her room.

The evidence as to her conduct was, in our opinion, insufficient to call for the charge, or to support the verdict, and for these reasons the judgment will be reversed and the cause remanded.

The employment of a boy only fifteen years of age in the hazardous position of brakeman, if without the consent of his mother and only parent, was a wrong done to that mother, and unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been by the employer, such a contract would not place him in the position of an employee, or preclude a recovery for injuries suffered from the negligence of a co-employee. *R. R. v. Miller*, 49 Tex., 322; 51 Tex., 274; *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Hill v. Gust*, 55 Ind., 45; 2 *Thompson on Negligence*, p. 977, sec. 8, and authorities cited.

A minor may be of sufficient age and discretion to justify his employment as a brakeman. 51 Tex., *supra*. Whether this boy of fifteen years could have been properly employed in that position was, we think, a question of fact for the jury; not, as appears to have been assumed in the trial, one of law for the court. 2 *Thompson on Negligence*, *supra*.

The judgment is reversed and the cause remanded.
Reversed and remanded.

See Grand Rapids, etc., R. R. Co. v. Showers, 2 Am. and Eng. R. R. Cas. 9.

CAULEY

v.

PITTSBURG, CINCINNATI, AND ST. LOUIS RY. CO.

(Advance Case, Pennsylvania. January 8, 1882.)

In an action by a minor, seven years old, against a railroad company, to recover damages for an injury alleged to have been occasioned by the negligence of defendant's servants, plaintiff offered to prove that he being on a sand car standing on a switch within the city limits, the car was moved a few yards, and that while the car was in rapid motion the conductor ordered him off, in obeying which order the plaintiff was injured:

Held, that the plaintiff being a trespasser, the offer did not contain any evidence of negligence on the part of defendant, and that therefore the same was properly rejected.

An offer to prove a fact which can only exist by the suspension of natural laws should not be received.

ERROR to the Common Pleas No. 2, of Allegheny County.

Case by John H. Cauley, a minor, by his father and next friend, John Cauley, against the Pittsburg, Cincinnati, and St. Louis Ry. Co., to recover damages for an injury to plaintiff alleged to have been caused by the negligence of defendant's servants.

Plaintiff's father also brought an action against the company defendant to recover damages for loss of service, etc. Both cases resulted in judgments for defendant. Plaintiffs took one writ of error for both cases, which was, however, quashed on the ground that a separate writ should have been taken to bring up each case. The full facts of the cases, the rulings of the court below, the assignments of error, the arguments of counsel, and the opinion of the Supreme Court delivered by Paxson, J., quashing the writ of error but expressing the opinion of the court on the merits of the cases are reported 2 Am. & Eng. R. R. Cas. 4.

Plaintiff in this case thereupon took this writ, filing the same assignments of error as had before been filed by him.

A. M. Watson, for plaintiff in error.

Hampton and Dalzell, for defendant in error.

PAXSON, J.—This case has been twice argued. There were two suits brought against the defendant company to recover damages for the injuries complained of, one by the father in his own right, the other, which is the present case, by the boy who was injured.

They were argued together, and the writ in each case quashed for the reasons that but one writ was issued to bring up the two cases. As they were fully argued we deemed it proper to express our opinion upon the merits. No fault was found with our view of the case in which the father sued in his own right. But as to the present case the learned counsel for the plaintiff was of opinion that we had not given due consideration to the distinction which exists between children and adults in the matter of contributory negligence. A second writ of error was accordingly sued out and was heard at the last term in the Western District.

A reconsideration of the case, aided by the second argument, has failed to satisfy us of any error in the former opinion.

The distinction referred to was not lost sight of. It is true that we did not discuss it then, nor do we propose to do so now, for the reason that conceding all that is claimed for it, no negligence was shown or offered to be shown on the part of the defendant company. All the conductor did was to order the plaintiff off the car. This was his duty to do. The boys were trespassers, and their removal from the car was not in itself a cause of complaint. Was there anything in the manner of their removal which would render the defendant company liable in damages? The plaintiff was not thrown off the car. He was not touched by the conductor or any railroad employee. He was told to get off a sand car which was being shifted from a siding to a switch a few yards distant. Had the conductor any reasonable ground to believe when he told the boys to get off that any of them would be injured in doing so? Before the company can be held liable it must appear that the injury to the plaintiff was the natural and probable result of the conductor's order; such a consequence as he might and ought to have foreseen at the time. (*Hoag v. Railroad Co.*, 4 Norris, 293.) A sand car is a low flat from which an ordinary boy between seven and eight years of age can jump with perfect safety. If it was alleged and offered to be shown that the plaintiff was frightened at the order he received, it is difficult to perceive how such fact can impute negligence to the defendant. If the brakeman approached the boys in a manner indicating an intention of enforcing the conductor's orders, it only shows that they had refused to comply with his previous request. It was urged, however, and there was an offer to prove, that the car was going at a rapid rate of speed when the plaintiff was told to get off; as a general rule when an offer of evidence is rejected we must assume the fact to be as stated in the offer. But in the present instance the plaintiff's own statement of his case shows this portion of the offer to have been a physical impossibility. The history of the case, which we have a right to assume to be correct, contains this statement. "On the 20th of September, 1879, John H. Cauley, the minor son of John Cauley, and plaintiff in this suit, about 9 o'clock A. M., in company with a num-

ber of small boys but little older than himself, was playing on a car laden with sand upon a side-track of defendant's road, which car formed part of a train that the defendant's employees, under the direction of one of the freight conductors in charge, were shifting in order to run the same upon a switch a few yards distant. These boys had been playing upon this sand car, and after the train began to move towards the switch with increased speed, the conductor ordered them to get off the car." That this sand car in being shifted from a side track to a switch but a few yards distant, could acquire a rapid rate of speed, is such a physical impossibility as to render the use of those words in the offer of no significance. An offer to prove an impossible thing must be received. But an offer to prove a fact which can only exist by the suspension of natural laws does not come within the rule.

From the best consideration we can give this case we are of opinion the judgment must be affirmed.

TRUNKY and STERRETT, JJ., dissent.

See *Cauley v. Pittsburg, etc.*, R. R. Co., 2 Am. & Eng. R. R. Cas. 4.

CHICAGO AND N. W. RY. CO.

v.

SMITH.

(*Advance Case, Michigan. October 5, 1881.*)

An eight-year-old boy trespassing upon the premises of a railroad company got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started at that moment and the tender passed over his arm. He was a boy of more than average intelligence and had been warned against going on the premises or riding on the engine. *Held*, that the railway could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury.

ERROR to Marquette.

Dan H. Ball, for plaintiffs in error. G. W. Hayden, for defendant in error.

MARSTON, C. J.—While the witnesses do not fully agree upon the facts, yet in the view which we are compelled to take, the dispute becomes immaterial. The court charged the jury in substance and affect, that if they found the facts to be as testified to by the defendant's witnesses, the plaintiff could not recover, and the instruction given, as to the right of the company to a clear track, and

the boy being a trespasser that it could only be held liable in case there was gross and wanton negligence on its part, such negligence as would indicate an indifference to the safety of the boy, was undoubtedly correct. The important question in the case as submitted is whether the court should not have charged the jury, as requested, that under the evidence the plaintiff could not recover. Taking the testimony of the boy, and accepting it as true in every respect, and there is no evidence in the case more favorable to the plaintiff, and it fails to show, or tend to show, that the engineer knew or had reason to know that he was there at all, and consequently there could have been no negligence on his part in starting the engine. Neither does the boy's evidence tend to show that the fireman knew or had reason to suppose, that he had fallen down, or was in any danger of being run over or injured—and certainly there is nothing in the whole case tending to show that any of the defendant's servants were wanton or wilful in their conduct, or indicating a decree of indifference on their part as to the safety of the boy. Even should it be conceded that negligence on the part of the fireman, would render the company liable, yet the evidence does not fairly tend to show, that he had any reason to believe that the boy would not have ample time to clear the track, or that it was at all necessary for him to call the attention of the engineer to the fact that the boy was there.

It is not claimed that the boy would have been injured had he not, in some unaccountable way, fallen down, but there was nothing in his age, appearance, or knowledge of trains, or in the height of the step upon which he was standing from the track, to indicate or lead any person to suppose that he would fall. Falling under such circumstances would be an exception and not the rule, and cannot therefore be made the foundation for a liability against the company without proof of actual knowledge, which is wholly lacking in the present case.

The evidence is clear that the locomotive was in all other respects properly managed and under complete control of the engineer at the time of the accident, so that no charge of carelessness can arise thereon. We need not therefore dispose of this case upon any mere question of pleading, or because of any variance between the allegations in the declaration and the proofs, or whether the negligence of the fireman alone would be sufficient to charge the company. The evidence is all set forth in the record and it fails to indicate that degree of negligence, upon the part of any servant of the company, necessary to create a liability.

The evidence does show the boy to have been a trespasser; that he was possessed of more than average intelligence for one of his age; he knew that he had no right there, and repeatedly had been ordered away on previous occasions, and warned by his parents against going on the track or in place of danger; that when ordered

off he would have escaped all injury but that he stumbled and fell, which was unknown to and could not have been anticipated by any person upon or in charge of the locomotive. In other words the injury resulted from an accidental fall of the boy and without any carelessness or negligence of the company's servants, and the jury should have been instructed that under the evidence the plaintiff was not entitled to recover.

The judgment must be reversed with costs and a new trial ordered.

(The other justices concurred.)

HOFFMAN, RESPONDENT,

v.

THE N. Y. C. & H. R. R. R. CO., APPELLANT.

(*Advance Case, New York. Nov. 22, 1881.*)

The removal of trespassers from the cars is within the implied authority of the company's servants on the train, and the fact that they acted illegally in removing a party while the train was in motion does not exonerate the company.

A question on cross-examination of a witness for defendant as to his relationship with an officer of defendant is admissible in the discretion of the judge.

A statement by the judge in his charge that plaintiff was "a very intelligent, and, I think, truthful youth—I mean so far as a desire to tell the truth is concerned," is not erroneous; that he did not thereby take the question of plaintiff's credibility from the jury.

THIS action was brought to recover damages for injuries received by plaintiff, which were alleged to have been caused by one of defendant's servants. It appeared that plaintiff, a boy eight years of age, while stealing a ride on one of defendant's cars, was kicked from the platform by defendant's brakeman, the train being moving at the time at about ten miles an hour.

Samuel Hand, for appellant.

Nelson Smith, for respondent.

ANDREWS J.—The jury have found that the plaintiff was kicked from the car while in motion by the conductor or brakeman. There was a very sharp conflict of evidence upon this question. The testimony of the conductor and brakeman, and of a bystander tended strongly to show that neither the conductor nor brakeman touched or said anything to the plaintiff, and that he and other boys jumped off the platform of the car as the brakeman came out of the door.

It is not claimed that the finding of the jury upon this issue is unsupported by evidence, and the point is not raised by any exception, but it is insisted that the act of kicking a boy from a car while in motion, assuming that it was done by the conductor or brakeman, was not within the scope of any authority conferred by the defendant upon the persons in charge of the train, but was an illegal, wanton and wilful act, for which the employer is not responsible.

By the general regulations adopted by the defendant, in force at the time of the transaction in question, the conductor has charge of the train, and is responsible for its safe and proper management, and brakemen and other servants thereon are subject to his orders. He is authorized to remove from the car persons who refuse to pay their fare or are drunk, riotous or unruly; but the regulations declare that in exercising this authority he must be governed by the provisions of law. The only provision of law on the subject is found in section 35 of the general railroad act (Laws of 1850, Chap. 140) which provides that if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him and his baggage out of the cars, using no unnecessary force at any usual stopping place, or near any dwelling house, on stopping the train. The regulations defining the duties of brakemen introduced by the defendant are not printed in the case, and there is no proof before us of any specific authority given to brakemen to remove trespassers from the cars. It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders. But he is a servant of the company on the train, concerned in its management, and fully cognizant of the obvious fact that intruders, who jump upon the train for a ride, without the intention of becoming passengers, are wrongfully there. Suppose, as counsel suggests, a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defence to an action against him for the assault, that he was brakeman, and did the act complained of in that capacity, although without express authority. The implied authority in such a case is an inference from the nature of the business and its actual daily exercise, according to common observation and experience. But assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so

as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal. But the point is was the act within the scope of the employment and authority. If it was, and the servant in doing what he did undertook to act for the company, and not for himself or for his own ends, the company is not exonerated, although the servant may have deviated from instructions in executing the authority, or may have acted without judgment or even brutality. The removal of trespassers from the cars was, as we hold, within the implied authority of the defendant's servants on the train. The fact that they acted illegally in removing the plaintiff while the train was in motion does not exonerate the defendant. In some cases, where the existence of an authority in the servant to do a particular act is in controversy, and the authority is sought to be established by inferences and implications, it may be a material circumstance bearing upon the non-existence of the authority sought to be implied, that the act was one which the master could not do himself without a violation of law. But this fact would not be decisive. No doubt the kicking of the boy off the car was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant to exercise proper care in executing the authority confided to them. But in most cases, where the master has been held liable for the acts of a servant, the tortious act was a breach of the servant's duty. In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the jury found that the authority was used as a mere cover for accomplishing an independent and wrongful purpose of their own. The general subject has been recently considered in this court, and it is unnecessary further to elaborate it. *Higgins v. the Watervliet Turnpike Co.* 46, N. Y. 23; *Rounds v. D. L. & W. R. R. Co.*, 64 id., 129. We think the court would not have been justified in taking the case from the jury.

The trial judge, in the course of his charge, said that the evidence for the plaintiff came from Vogel, and this young man (referring to the plaintiff) "A very intelligent and, I think, truthful youth—I mean so far as a desire to tell the truth is concerned—but who was eight years old at the time the thing happened." The defendant's counsel, at the conclusion of the charge, excepted to "that part of the charge in which the court expressed the opinion that the plaintiff was a truthful young man." The Court replied: "I did think so, but I did not say that for that reason he ought to be believed." The credit to be given to a witness involves the consideration of his intention to tell the truth, as well as the accuracy of his memory, and in both branches it is for the jury. But we think it is not an error of law for a judge to indicate an opin-

ion as to the honesty of a witness in commenting upon his evidence. At the same time, in view of the just regard which is paid by jurors to the opinions of the judge, it is doubtless proper that in a case of conflicting evidence he should use great caution in expressing his opinion. In this case the judge did not assume to take the question of credibility from the jury; and when his attention was called to the subject by the exception, he unmistakably referred the matter to them. It would greatly embarrass the administration of justice if every unguarded expression of opinion by the judge on a question of fact during a trial should be subject to exception as invading the province of a jury, and we have seen no well considered authority sustaining such a rule. *Winne v. McDonald*, 39 N. Y. 233.

The questions put to the witness Cross, touching his relation to Mr. Vanderbilt, the president of the defendant, were within the range of a proper cross-examination, and were properly admitted in the discretion of the judge.

There was no error in excluding the police station record. It was not competent original evidence of the cause of the accident, and it was inadmissible to contradict Vogel, as he was not shown to have furnished the information from which it was made, or was cognizant of its contents.

We think the charge covered all the material questions in the case, and although this court, on reading the appeal book, may not be fully satisfied with the verdict, its function is performed when it determines the alleged errors of law, and finding no valid exceptions in this case, the judgment should be affirmed. All concur.

THE PENNSYLVANIA CO.

v.

LILLY.

(73 *Indiana Report*, 252. *May Term*, 1881.)

In an action by a parent against a railroad company, for negligently causing the death of his infant child, he is entitled to recover only for the pecuniary injury he has sustained. The proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses and medical services.

In such action, to enable the parent to recover full damages for the services of the child during his minority, such damages must be specially averred and demanded in the complaint.

Where, in such case, the complaint did not aver and demand damages for

the loss of the future services of the child, and there was no evidence tending to show a loss of such services to the parent, a verdict assessing his damages at \$1,800 is excessive.

From the Marshall Circuit Court.

J. Brackenridge, A. Zollars and F. T. Zollars, for appellant, cited *Ulrig v. Sinex*, 32 Ind. 493; *Broom's Legal Max.* 626; Ohio, etc., *R. R. Co. v. Tindall*, 13 Ind. 366; *Long v. Morrison*, 14 Ind. 595; *Boyd et al v. Blaisdell*, 15 Ind. 73; *Rogers v. Smith*, 17 Ind. 323; *P. Ft. W. & C. R. W. Co. v. Vinning*, 27 Ind. 513; *Hilliard on Torts*, 3d edition, Vol 2, P. 519; *Oakland R. W. Co. v. Fielding*, 48 Pa. St. 320; *Gilliman v. The N. Y. & H. R. R. Co.* 1 E. D. Smith, 453; *Ill. Central R. R. Co. v. Weldon Admr.*, 52 Ill. 290; *Conant v. Griffin Admr.*, 48 Ill. 410; *Donaldson v. Mississippi & M. R. R. Co.*, 18 Ia. 280; *Penn. R. R. Co. v. Vandever*, 39 Pa. St. 298; *Whitney v. Hitchcock*, 4 Denio 461; *Penn. R. R. Co. v. Zebe et al.*, 33 Pa. St. 318; *Penn. R. R. Co. v. Kelly*, 31 Pa. St. 372; *Rogers v. Smith*, 17 Ind. 323; *Saffard v. Drew*, 3 Duer 627; *Gillman v. The N. Y. & H. R. R. Co.*, 1 E. D. Smith, 453. *Sedgwick on Damages*, 6th ed., 696; *Penn. R. R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc., R. R. Co. v. Roman*, 66 Pa. St. 315; *Myer v. San Francisco*, 42 Cal. 215; *Shouler's Dom. Relations*, 352; *Cincinnati, etc., R. R. Co. v. Eaton*, 53 Ind. 307; *Burke v. R. R. Co.*, 10 Cent. L. J., 48; *Hall v. Hallender* 7 Dow. & Ry. 133; *Hilliard on Torts*, 219; *Burton v. Hudson*, etc., *R. R. Co.*, 18 N. Y. 248; *Whar. on Neg.* 300, 420; *Potter v. Chicago, etc., R. R. Co.*, 21 Wis. 362; *Higgins v. Jeffersonville*, etc., *R. R. Co.*, 52 Ind. 110; *St. Louis, etc., R. R. Co. v. Mathias*, 50 Ind. 65; *Jackson v. Indianapolis, etc., R. R. Co.*, 47 Ind. 454.

The Bellefontaine R. R. Co. v. Hunter Admr., 33 Ind. 335; *Toledo, etc., R. R. Co. v. Goddard*, 25 Ind. 185; *Penn. Co. v. Sinclair Admr.*, 62 Ind. 301; *Wilcox Admr. v. Rome*, etc., *R. R. Co.*, 39 N. Y., 358; *North Penn. R. R. Co. v. Heilman*, 49 Pa. St. 60; *Baxter v. Troy and Boston R. R. Co.*, 41 N. Y. 502; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Penn. Canal Co. v. Bently*, 66 Pa. St. 30; *Chicago, etc., R. R. Co. v. Sweney Admr.*, 25 Ill. 332; *Lake Shore, etc., R. R. v. Miller*, 25 Mich. 274; *Butterfield v. Western R. R. Co.*, 10 Allen, 532; *Moore v. Central R. R. Co.*, 4 Zab. 268; *Bellefontaine R. R. Co. v. Snyder*, 24 O. St. 670; *Penn. R. R. Co. v. Beale*, 73 Pa. St. 503; *Wilds Admr. v. Hudson River R. R. Co.*, 29 N. Y. 315; *Telfer Admr. v. Northern R. R. Co.*, 30 N. J. 188; *Starkus v. N. Y. Central and Hudson River R. R. Co.*, 7 Hun. 559; *Artz v. Chicago R. I. & P. R. R. Co.*, 34 Ia. 153; *Haines v. Illinois Central R. R. Co.*, 41 Ia. 227; *Subley v. London*, etc., *Ry. Co.*, L. R. 1 Exch. 13; *Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, etc., R. R. Co. v. Bowen*. 40 Ind. 545; *Hathaway v*

Toledo, etc., R. R. Co., 46 Ind. 25; Jeffersonville, etc., R. R. Co. v. Bowen, 49 Ind. 154; Evansville, etc., R. R. Co. v. Wolf, 59 Ind. 89; Wait v. Northeastern Ry. Co., 96 Eng. Com. L. 719; Hughes v. Macfie, 2 Hurl and Colt 744; Hally v. Boston Gas-light Co., 8 Gray 123; Wright v. Malden, etc., R. R. Co., 4 Allen 283; Hatfield v. Roper, et al., 21 Wend 615; Brown v. E. & N. A. R. R. Co., 58 Me. 384; Artz v. Chicago, etc., R. R. Co., 34 Iowa 153; Terre Haute, etc., R. R. Co. v. Graham, 46 Ind. 239; Jeffersonville, etc., R. R. Co. v. Goldsmith, 47 Ind. 43; Philadelphia, etc., R. R. Co. v. Hummel, 44 Pa. St. 375; Pittsburgh, etc., R. R. Co. v. Evans, 53 Pa. St. 250; Gillis v. Penn. R. R. Co., 59 Pa. St. 129; Indianapolis, etc., R. R. Co. v. McClaren, Admr., 56 Ind. 566; Tilfer v. North R. R. Co., 30 N. J. 188; Pittsburgh, etc., R. R. Co., v. Bingham Admr. 29 Ohio, St. 364; Illinois, etc., R. R. Co. v. Godfrey, 71 Ill. 500; Citizen's St. R. R. Co., v. Carey, 56 Ind. 396; St. Louis, etc., R. R. Co. v. Manley, 58 Ill. 300; Barker v. State, 48 Ind. 173; Penn. R. R. Co. v. Vandever, 36 Pa. St. 298.

M. A. O. Packard and O. M. Packard, for appellee.

NIBLACK, J.—This was a suit by James Lilly against the Pennsylvania Company, for killing his infant child. A demurrer to the complaint for want of sufficient facts being first overruled, the defendant answered in general denial. A jury returned a verdict for the plaintiff, assessing his damages at eighteen hundred dollars, and, in disregard of a motion for a new trial, judgment was rendered against the defendant upon the verdict.

The first error assigned is upon the overruling of the demurrer to the complaint. The complaint charged that the defendant owned and operated a line of railroad known as the Pittsburgh, Fort Wayne and Chicago railroad, extending into and across the county of Marshall in this State, and through the incorporated town of Bourbon in that county, and through the business and residence portion of that town, cutting its streets diagonally; that it was the general custom of the citizens of that town to use that portion of the track of said railroad, extending from Main Street, at what is known as "Sheets' corner," eastward to the defendant's depot buildings, a distance of about thirty rods, as a public highway, or foot-path, for all persons passing and repassing, which custom had existed ever since the location and construction of said railroad, and was well known to, and understood by, the defendant's servants; that on or about the 11 day of March, 1874, the plaintiff's daughter Emma, who lived with him and was five years of age, left his house to go to school, the school-house being about half a mile distant, and on the opposite side of the railroad track from the plaintiff's house; that the said Emma went upon the railroad at the point where Main Street crossed it, and pursued her way eastward on the

track of said railroad in the direction of the school-house, being thus upon that portion of such railroad as was commonly used as a footpath, as above stated; that while the said Emma was so pursuing her way, on said railroad track, an express train, in charge of the defendant's servants, came speeding along, from the west to the east, the track being straight and without obstruction, and the said Emma being in full view of the defendant's said servants in charge of said train for the distance of one thousand feet, but that the said servants of the defendant, wholly neglecting and refusing to check the speed of said train, or to do anything to avoid a collision with, or injury to, the said Emma, carelessly, recklessly, and wilfully drove said express train at the high and dangerous rate of speed of forty miles per hour through the said town of Bourbon and against the said Emma, thereby killing and destroying her, the said Emma; that, at the time the said train was so run against her, the said Emma was making every effort, which, by reason of her immature years and frightened condition, she was capable of making to save herself from injury, which efforts on the part of the said Emma were well known to and observed by the defendant's said servants in charge of said train; that, by reason of the said negligent, reckless and wilful killing of the said Emma, the plaintiff had been made to suffer great mental pain and anguish, had been deprived of the happiness and comfort of her society, and had thereby suffered great damage. Wherefore the plaintiff demanded judgment for ten thousand dollars and for all other proper relief.

It is well settled that, in an action by a parent for the death of his child, he is entitled to recover only for the pecuniary injury he has sustained, and that the proper measure of damages is the value of the child's services from the time of the injury until he would have maintained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expenses of care and attention to the child, made necessary by the injury, funeral expenses and medical services. 2 Thompson Negligence, 1292; Shearman and Redfield Negligence, sec. 608; 2 Waits' Actions and Defences, 477; Cooley Torts, 270; 2 Addison Torts, paragraph 1273; The Ohio, etc., R. R. Co. v. Tindall, 13 Ind. 366.

To enable the parent, however, to recover full damages for the services of the child during his minority, such damages must be specially declared for and demanded. This requirement is in accordance with the rules of good pleading, and is recognized as obligatory in the case of *Gilligan v. The N. Y., etc., R. R. Co.*, 1 E. D. Smith, 453, which has become a leading case in actions of the class to which this belongs, and which has been either cited approvingly or followed by many of the text-writers and other decided cases. *Safford v. Drew*, 3 Duer, 627; *Rogers v. Smith*, 17 Ind. 323.

Counsel for the appellant insist that the complaint was bad, because it did not specially allege loss of services on account of the death of the appellee's child, and that, for that reason, the demurrer to the complaint ought to have been sustained. The complaint ought to have been more specific as to the loss of services resulting from the death of the child, but we cannot hold that it was not good as a demand for some loss of services. On the contrary, we think a fair construction of the facts alleged in it constituted the complaint a good demand for loss of services from the time of the death of the child until the commencement of this action, a period of a little more than five months. Accepting this construction of the complaint, it was correctly held to be sufficient upon demurrer.

Error is also assigned upon the refusal of the court to grant a new trial.

Counsel for the appellant further insist that the damages were excessive, and that a new trial ought to have been granted for that cause, if for no other. There was no evidence tending to show any loss of services to the appellee, except what might have been inferred from the age of the child, her relationship to the appellee, and the circumstances attending her death. Considered with reference to the evidence, and to the fact that the complaint did not constitute a demand for the loss of future services of the child, we are of the opinion that the damages were excessive, and that the court erred in overruling the motion for a new trial. As to the evidence necessary to make out a case for damages for loss of services, in a case like this, the reader is referred to 2 Thompson Negligence, 1,289, note 90.

As this cause will have to be returned to the court below for another trial, we express no opinion upon other questions presented upon the evidence. The *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Gann v. Worman*, 69 Ind. 458.

The judgment is reversed, with costs, and the cause remanded for a new trial.

PHILADELPHIA CITY PASSENGER RAILWAY COMPANY

v.

HENRICE.

(92 *Pennsylvania Reports*, 481. March 1, 1880.)

Where a fact is established in a cause by evidence, the jury may properly be allowed to draw therefrom such inferences as are logically deducible from it. Thus if it be shown that the driver of a car was asleep or intoxicated at the time of an accident, a presumption of negligence would properly arise. But the fact from which such inference is to be drawn must first be established.

It will not do to presume that he was in that condition from some remote fact, in no way connected with the case, and upon this presumption base the additional presumption of his negligence. A presumption should always be based upon a fact, and should be a reasonable and natural deduction from that fact.

A child of tender years was injured by a passenger railway car. The court permitted plaintiffs to ask a witness how many hours the drivers and conductors on the railway were employed each day, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident. *Held*, that this was error.

The court charged that if the driver saw the child in the street approaching the car, and in such close proximity that it might reach the track before the car passed, it was negligence on his part not to stop. *Held*, that this was error; that the standard of duty in such a case was a shifting one and for the jury.

January 12th, 1880. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON and TRUNKEY, JJ. STERRETT and GREEN, JJ., absent.

Error to the Court of Common Pleas, No. 1, of Philadelphia county: Of January Term 1879, No. 139.

Case by Charles Henrice, by his father and next friend, Frederick Henrice, against the Philadelphia City Passenger Ry. Co., to recover damages to said Charles, alleged to have been caused by the negligence of defendant.

At the trial, before Alison, P. J., it appeared that the mother of plaintiff kept a small candy store on Lancaster avenue. The defendants have two tracks on said street, one for eastward and one for westward bound cars. The track for eastward bound cars is on the south side of the avenue, on which is the residence of Henrice. About nine o'clock on the morning of the 21st of May, 1877, Mrs. Henrice had placed her son, a child about sixteen months old, on the floor of her store, with the purpose of waiting on a customer. While so employed the child went into the street, and was knocked over by car No. 127 of the defendant's line. The mother did not know that the child had left the room until she heard its screams. The child was injured by a car going east on the track nearest the house of Henrice. A woman living opposite had seen the child coming towards the track, and had thrown up her hands and motioned to the driver "to stop." Another woman testified that the driver could have seen the child if he had been looking; that one looking on the street could have seen the child. The driver testified that he did not see the child, and that he did not understand the woman who cried out to him, and that his attention had been diverted by a woman who was crossing the track in front of him. The plaintiffs proposed to ask a witness what were the hours of service per day then required by the company of the driver. This to be coupled with the offer to show that the hours of service required of other drivers were required of the driver of the car that ran over the child. Objected to. Objection overruled, and evidence admitted. (First and second assignments of error.)

The fourth and fifth points of the plaintiff were as follows, both of which the court affirmed:

4. If the driver saw the child in the street approaching the car, and in such close proximity that the child might reach the track before the car passed, and the car was then far enough from the child to be stopped, it was his duty to have stopped, and in that case his not stopping was negligence. (Third assignment.)

5. If you believe from the evidence that the driver of car 127 was required by the company defendant to work from seventeen to eighteen hours daily, and if you believe such time of service rendered him unable to discharge his duties properly at the time of the injury, then such facts may be taken into consideration by you as evidence of negligence on the part of the defendant. (Fourth assignment.)

The verdict was for the plaintiff for \$2500. The defendant took this writ, and alleged that the court erred as set forth in the above assignments.

D. W. Sellers, for plaintiff in error.—Instead of proof of negligence as a fact, the court admitted evidence from which the jury were to make inferences, and from these presume facts. That is, if the jury should think the contract of employment of a driver was too long in point of time, then, without any evidence, they were at liberty to believe such a time of service rendered him unable to discharge his duties properly, and thus they could impute negligence to the company. No conclusion is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. The law requires an open, visible connection between the principal and evidentiary facts, and does not permit a decision to be made on remote inferences: *Douglas v. Mitchell*, 11 Casey, 443. There is no duty in a driver to assume that a child will run right into a car, and that no parent or adult is on guard: *Phila. and Reading R. R. Co. v. Heil*, 5 W. N. C. 91.

M. H. Stutzbach and Benjamin H. Haines, for defendant in error.—It is not necessary, in order to sustain the court below, that the proof that such extraordinary hours of labor were required of the driver (with the consequent deprivation of usual sleep), should go to the extent of raising a legal presumption, that he would sleep or be in a sleepy condition during the day whilst engaged in his duties. Such proof was admissible as furnishing a probability that such would be the effect of such hours of labor upon the driver, and, as a fact in connection with the other circumstances, it is right to refer it to the jury: *Tanner v. Hughes*, 3 P. F. Smith, 290.

PAXSON, J.—The first, second and fourth assignments relate to the same subject, and may be considered together. The first and

second allege error in the admission of evidence on behalf of the plaintiff below to prove the hours of service required by the defendant company of its drivers and conductors, whilst the fourth relates to the instructions of the court upon said evidence.

The fact to be proved was, whether the driver of car No. 127 had been guilty of negligence upon the occasion in question in consequence of which the child, Charles Henrice, had been run over and injured. Was the evidence objected to of such a character as tended to prove this fact? It was undoubtedly competent to prove the condition of the driver at the time the accident occurred; that he was intoxicated, or absent, or for any other reason incompetent to attend to his duties: *Pennsylvania R. R. Co. v. Books*, 7 P. F. Smith, 339; *Mansfield Coal and Coke Co. v. McEnery*, 10 Norris, 185. These were specific matters which might have been proved; but how the fact that other drivers and other conductors were allowed only a certain number of hours for sleep and rest could affect the question of this particular driver upon this particular occasion is not apparent. It is easy to see, however, how such evidence might seriously influence the jury and increase the damages. When a fact is established in a cause by evidence, the jury may properly be allowed to draw therefrom such inferences as are logically deducible from it. Thus if it be shown that the driver was asleep or intoxicated at the time of the accident, a presumption of negligence would properly arise. But the fact from which such inference is to be drawn must first be established. It will not do to presume that he was in the condition referred to from some remote fact in no way connected with the case, and upon this presumption base the additional presumption of his negligence. This would be to found a presumption upon a presumption, which is never allowed. A presumption should always be based upon a fact, and should be a reasonable and natural deduction from such fact. The true rule was correctly stated by Mr. Justice Thompson, in *Douglass v. Mitchell's Exrs.*, 11 Casey, 443: "That as proof of a fact, the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and often are ascertained by just inferences. Not so with a mere presumption of a fact; no presumption can with safety be drawn from a presumption: there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn." What has been said applies to the charge of the court embraced in the fourth assignment, as well as to the offers of evidence. There was no evidence that the driver of car No. 127 was in any way rendered incompetent to perform his duties in a proper and careful manner by reason of the severity of his labors or the loss of rest and sleep. In the absence of such evidence we have but a mere presumption, and upon

this it was not competent to construct the further presumption of his negligence.

There was also error in affirming the plaintiff's fourth point. (See third assignment.) The point is framed upon the assumption that the driver saw the child approaching the car. There is no evidence upon this point save that of the driver himself, and he says he did not see it until after the injury. It is possible he might have seen it had he been on the alert—some of the witnesses say so substantially—but the point is not so framed. But if he had seen the child "in the street approaching the car, and in such close proximity that the child might reach the track before the car passed," it was still error to instruct the jury, as a matter of law, that it was negligence for the driver not to stop the car. The standard of duty in such a case was a shifting one, and for the jury, not a fixed rule, the same under all circumstances, and, therefore, for the court. It did not follow that the child would reach the car, and the point was framed upon the mere possibility of its doing so. From the driver's standpoint, assuming him to have seen the child, it may have appeared extremely improbable. It was a question for the jury to determine whether, under all the circumstances it was his duty to stop. It was error to rule it as a matter of law.

Judgment reversed, and a venire facias de novo awarded.

See note, p. 560.

MARCOTT

v.

MARQ., HOUGHT. AND ONT. R. CO.

(*Advance case, Michigan. October 12, 1881.*)

Rulings cannot be made on error, on questions of fact, or on questions of law that have not been decided against the plaintiff in error, and if such rulings were made, they could not bind the action of the jury on a new trial.

Negligence in injuries inflicted by railroad trains upon individuals is a question that depends upon the circumstances and can rarely, if ever, be absolutely defined as matter of law; and in determining whether there has been negligence all the circumstances must be considered together.

The care required of all persons doing business involving danger, must be such as is reasonably calculated to avoid serious consequences therefrom, so that if there are such consequences they may be considered as accidental only.

In an action for negligent injury negligence which did not contribute to the injury need not be regarded.

A case cannot be taken from the jury unless it is plain upon the strongest showing made by any of the witnesses, that there is no cause of action.

A case must be absolutely free from conflict before it can be taken from the jury.

Courts cannot assume that witnesses whom they must credit will be followed by the jury, and no matter how dissatisfied a court may be with the conclusions of the jury, it cannot usurp their functions.

The lookout upon a locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual.

It is a question for the jury whether a special train can be run without negligence at such a speed as to make it difficult to check its speed within a reasonable time and distance.

A railroad train ran over a child on the track. It appeared that there were visitors in the cab of the engine, and that the presence of strangers without leave was prohibited by rule. *Held*, that it was proper for the jury to consider the fact with other circumstances as bearing on the question of negligence.

The statutory regulations concerning the fencing of railways apply north of Saginaw river except that the statutory penalty for neglecting to build them is not in force. Act 98 of 1875.

Error to Marquette circuit.

F. O. Clark, for plaintiff in error. W. P. Healy, for defendant in error.

Campbell, J. Plaintiff in error sued defendants for the death of his child, a little boy of two and a half years old, who was killed by an irregular train consisting of a locomotive and a single car of invited guests on an excursion from Marquette down the line. The train had just passed by Champion station, and the boy was killed at a point 1,000 feet west of it, between 10 and 11 o'clock of the morning of September 20, 1877.

It appears that the child and a brother not more than two years older were walking on the track westward, and nearly opposite plaintiff's house, when the older boy was in some manner startled by the approach of the train and tried to get the little brother off, but the latter fell and he could not. It appears further that a neighbor named La Coss who lived across the track a little westward from plaintiff was sitting on his steps at work, with his back to the road, when his wife called to him that the children were on the track, and he rushed at once and signalled the train by throwing up his arms, and ran to save the children. The oldest was off and he had reached within five feet of the place, when the train struck the youngest and fatally injured him in the head. It is not shown by the record—which does not set out all the testimony—whether the train passed over him. The whistle to put on brakes was blown, as La Coss testifies, about 215 feet from the place of the injury. The train ran 900 feet further before it stopped. The distance traversed by La Coss was 175 feet. He testifies that when he first started and saw the children the train was on the switch west of the depot. The testimony is that the place of injury was 1,800 feet from the depot, and that the switch enters the main

track between 600 and 700 feet from the depot, or between 1,100 or 1,200 feet from the place of the injury.

No one in the train appears to have known what had occurred, until it reached a station several miles further off, to which the news was transmitted. The engineer and fireman did not, so far as appears, or is claimed, see the children or either of them, and no inquiry was made at the time into the cause of the stoppage. The track was level and objects on it could be seen, according to the testimony, from a quarter of a mile east of the depot, or something over half a mile eastward from the place of the injury, and for about the same distance westward. The track was not fenced. Several houses were scattered along the road between the depot and plaintiff, who occupied the most westerly of them all, and who at the time of the injury was at work on the road about a mile west of his house, as section foreman of the road. The action being based on the negligence of the defendant's servants, in not using such care as was incumbent on them under the circumstances, the facts set out calling for care and the failure to use it were in brief the unfenced road, the omission to give signals, the excessive speed of the train, the lack of adequate means of stoppage, the failure to keep such a lookout as should have been kept, and the existence of special hindrances to a vigilant lookout in the presence of strangers in the cab of the locomotive, whose being there tended to interfere with the view and to distract the attention of the engineer and fireman.

The circuit judge, while himself of opinion that there was evidence for the jury on several matters of importance, took the case away from them, and directed a verdict for the defendants, and did this on the ground that this court had on a previous hearing on error declared there was no negligence apparent from the record as there made up, and that if there was none in those respects, the evidence of the presence of the visitors was not by itself sufficient to show a cause of action. Before considering the questions presented by the present record, it is necessary to refer a moment to the misapprehension of the circuit judge concerning the action of this court, in the case of the Marquette, Houghton and Ontonagon R. Co. v. Marcott, 41 Mich. —. In that case the judgment was reversed because it was given to the jury on a theory not set up in the declaration. It was not held that there was not sufficient evidence to go to the jury on other points, but on the contrary attention was called to the fact that the defendant's counsel on the trial admitted to the jury that the plaintiff was entitled to a verdict if they did not use reasonable care, and it was held that the ground could not be shifted in this court for a different one. Upon several points sought to be raised there, the rulings below were such as to be subject to no complaint on the part of the railroad, and the only ground passed upon by this court for reversal was the occu-

pation of the cab by visitors,—no such averment being contained in the declaration.

There was no ruling whatever, and there could have been none, upon the question of fact, which belonged to the jury, or upon questions of law which had not been decided against the party bringing error. In the case of *Richards v. Fuller*, 38 Mich. —, we had occasion to hold it erroneous to instruct a jury to follow the findings of this court as precedents on questions of fact; and we certainly did not imagine that any one could suppose we were giving any rulings in this case which could anticipate or bind the action of a jury in a future trial on a question of fact; or on any question of law or fact which was not presented for decision by the record. Recurring to the present record, the question presented is whether there was anything to go to the jury. If there was, then the case should have been submitted.

The responsibility of railroads for injuries to persons by trains can very seldom, if ever, be determined on pure questions of law. Negligence depends too much on the circumstances of the transaction complained of, to be capable of any absolute definition by special facts. In order to create liability something must have been brought about which would not probably have happened if the party complained of had not failed to use the care and precaution which it was wrong not to use under the circumstances. But in considering this all the circumstances must be regarded. They cannot be taken up one by one and the act be pronounced right or wrong in view of any of them isolated from the rest.

Thus, looking at the present case, it cannot be said as a matter of law that there is any necessary inference of actionable negligence in having no fences, or in running at high speed, or in not having air-brakes, or in the failure to see persons on the track, or in allowing strangers in the cab. But it is possible that the existence of any or all of these conditions may impose duties of greater vigilance than would be required by safety in their absence. The rule of law is the same as that of prudence in this respect,—that the care to be expected of all persons exercising business involving danger, must be such as is reasonably calculated to avoid serious consequences from that danger. And where the danger is such as to imperil human safety, the care should be such, and only such, as may be reasonably regarded as enough to prevent the possibility of mischief, so that if it occurs it may be rightly treated as accidental and not negligent. And negligence which does not contribute to results need not be regarded. The testimony in this case was partly concurring and partly conflicting. It is undisputed that the track was unfenced, that there were none but common brakes, that the engine was not reversed, that the train passed the station without stopping, that two persons were in the cab not belonging there, that the engineer and fireman did not see the children at any time, and

that they could have been seen by any one looking down the track so long as they were on it, and that no inquiry was made into the cause of stopping the train.

There is a conflict concerning the giving of signals—concerning the speed of the train, and some matters collateral. So far as the record shows we do not understand that there is any dispute concerning distances. There was at all events evidence on them. Where a case is taken away from the jury, it cannot be authorized unless upon the strongest case made by any of the witnesses, it is manifest there was no cause of action. Courts cannot assume that the witnesses whom they would most credit are to be followed by the jury. And however much they may be discontented with the result, they cannot usurp the functions of the jury. A very striking illustration of this rule is found in the recent case of *Dublin, Wicklow and Wexford Ry. v. Slatterly*, L. R. 3 App. Cas. 1155, where the house of lords, very much against its own view of the facts, sustained a judgment involving some of the features of the present case. And a similar holding was made in *Bridges v. North London Ry. Co.* L. R. 7 H. of L. 213. The doctrine is well settled here. The case must be absolutely free from conflict before it can be taken from the jury. In the record before us, assuming as we must for this particular discussion that the plaintiff's case might have been accepted by the jury, we have this possible state of facts, the probability of which we cannot pass upon.

There were witnesses who swore that there was no sounding of bell or whistle before, at, or after the highway crossing or passing the depot, nor any signal until the brake-whistle was given just before the child was reached. The testimony further—if believed—tended to show that an irregular special—out of ordinary train time—came thus without warning through a small settlement over an unfenced track at a speed said by some witnesses to have been double that of an ordinary passenger train, and 40 miles or more an hour; that the children, one of whom was killed, were seen on the track by the man that tried to rescue them when the train was 1,100 or 1,200 feet distant from them; that there was no such lookout by engineer or fireman during that distance as led to their notice; that the train ran that distance when that person was running at the top of his speed 175 feet, and that when the brakes were put on, the train, consisting only of one car besides the locomotive, ran about 1,100 feet before it came to a stand. If the signals were not given, there was a distinct violation of the law, which we cannot as a matter of law say had no effect on the result. It appears beyond question that La Coss would have saved the child if he could have reached it a very little earlier, and that he started as soon as he had knowledge of the train. The same result would have been reached if the train had been two or three seconds

later at the point of injury, and this might have been done either by a very trifling diminution of speed, by braking or otherwise.

If the testimony to the contrary is true the signals were given, and the speed was not excessive. But as already suggested this was for the jury. The same may be said in regard to the efficiency of the lookout. There can be no doubt it should be such as reasonably required by the circumstances, and that it should be more careful where there is risk of access to the track than where it is less likely. And it cannot be said that if the speed of an unexpected train is very great this risk is not more serious than otherwise. The necessity of a careful lookout is recognized by the unwritten law of navigation, and it is apparent on railroads. The strict requirement of airbrakes laid down by statute as indispensable on regular passenger trains (Laws 1875, p. 137) assumes there will be such vigilance as will enable trains to be checked at the first appearance of danger. This leads to the consideration of another question, relating to brakes. The statute requiring airbrakes or their equivalent is confined in terms to regular passenger trains. Laws 1875, p. 137. That statute was amended from the statute of 1873 by requiring such brakes to be applicable to every car on the train, whereas before there was no such sweeping requirement. The need of such brakes is evidently governed somewhat by speed—freight trains being slower than passenger trains, and being also made up, as the witnesses show, so as to make airbrakes inapplicable. The statute does not in terms reach any irregular trains. But it was a question for the jury whether a special train could be run without negligence at such a speed as to make it difficult to check its speed within a reasonable time and distance.

It appeared on the trial that the presence of strangers without leave on cab is prohibited. On steamers the rule forbidding access to the helmsman has always existed as a measure of precaution against having his vigilance diverted. The jury had a right to consider it with the other circumstances. It was claimed on the hearing before us that the statutory regulations concerning fences had no application north of Saginaw river. This is an error. Section 15 of article 4 of the general railroad law as amended in 1875 (Laws 1875, p. 139) is devoted to this subject, and imposes liability for damages for injuries occurring from the want of fences, and a penalty of \$200 a week for the omission to build them. The proviso in regard to fences north of the mouth of Saginaw river, is that if not built as required by that section "the corporation owning or operating such line of road shall not be liable to said penalty of \$200 per week, but shall be liable to all the other provisions of this section." The propriety of fencing is thus very explicitly declared, and the company required to use diligence not to incur risks from the want of it.

Upon the record we think there was evidence for the jury which

would have authorized them to inquire whether under all the circumstances there was actionable negligence. Judgment must be reversed with costs and a new trial granted.

(The other justices concurred.)

See note, p. 560.

JAMES SMITH, by his next friend, WILLIAM SMITH,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD CO.

(25 *Kansas Reports*, 738. *January Term*, 1881.)

Where a child two years old strays away from his home, without the knowledge or consent of his parents, and goes upon a railroad track, which is about 100 feet from his home, and within three minutes after leaving his home is injured by a car, belonging to the railroad company, running over him, *held*, that it cannot be said, as a matter of law, that the failure of the parents to keep the child away from the railroad track was per se culpable negligence contributing to the injury.

Where a railroad track is constructed in a populous neighborhood near a city, and children and others often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened, and the persons operating the road loosen the brakes of a car loaded with coal, and let it run down this steep grade, without any person being on the car, or without any means of stopping it, and without first looking to see whether the track was clear or whether any person was on the track or not and a child who was on the track was run over and injured, and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road before they loosened the brakes, *held*, that the courts cannot say, as a matter of law, that the persons operating the road were not guilty of negligence; but it is a question of fact which should be submitted to the jury.

Where a railroad company owns a switch track constructed from the main track to a coal shaft belonging to a mining company, and the railroad company furnishes cars to this mining company to be loaded with coal, and when loaded permits the mining company to loosen the brakes of the cars so that the cars will run down the steep grade of the switch track to a point where the track is level, and the mining company, after loading a certain car, negligently loosens the brakes thereof and allows the car to run down the steep grade of the switch track and over a child and thereby injures it, *held*, that the railroad company is responsible for the injury.

ERROR from Osage District Court.

Action for damages for personal injuries, brought by James Smith, an infant, by his next friend, William Smith, against the railroad company. Trial at the April Term, 1879, of the district court, and judgment for the defendant. The plaintiff brings the case here. The facts appear in the opinion. C. S. Martin and

Ellis Lewis for plaintiff in error. Ross Burns, A. A. Hurd and W. C. Campbell for defendant in error.

The opinion of the court was delivered by

VALENTINE J.—This was an action for damages brought by James Smith, an infant two years and twenty days old, by his next friend, William Smith, against the Atchison, Topeka & Santa Fe railroad company. The action was tried before the court and a jury, and after the plaintiff had introduced his evidence and rested, the defendant demurred to the evidence, upon the ground that it did not prove any cause of action in favor of the plaintiff and against the defendant. The court below sustained the demurrer and rendered judgment in favor of the defendant and against the plaintiff, who brings the case to this court.

The plaintiff claims that the evidence introduced in the court below shows that the facts in this case are substantially as follows: On September 26, 1878, the plaintiff was badly hurt, being crippled for life, by being run over by a flat car on a sidetrack of the Atchison, Topeka & Santa Fe railroad, near Osage City, Kansas; he was only two years and 20 days old. The defendant was the owner of, and operated the switch, using it daily. The switch was 300 feet long, and built with a heavy grade, down which cars would run with great force when the brakes were loosened. The employes of the carbon coal and mining company used this switch almost constantly in loading coal. At the time the plaintiff was hurt, and just prior to the actual injury, the employes of the Carbon Coal and Mining Company loaded a flat car at its coal shaft and chute, on this side track, and took off the brake, and the car ran down the grade, no one being on it, and it ran over the plaintiff. He lived with his parents about 100 feet from the switch, and had not been gone from the house more than three minutes when he was hurt. The switch was in a populous neighborhood, beyond the limits of the city and the track not fenced. The Carbon Coal and Mining Company had been using the switch for nearly two years. It had always allowed the cars to run down the grade when loaded, without the brake being set on any of them. The track was clear from the shaft to the place where the grade changed, and where the cars would stop of their own accord. The employes of the company had at different times driven children off the track. At the time when the car which ran over the plaintiff was started, one Chris. Black started it, and did not look to see whether any one was in the way or not, although he could have seen any one on the track if he had looked. Black was an employe of the Carbon Coal and Mining Company. The railroad company used the switch daily, sending in and taking out cars.

The defendant would seem to admit the foregoing facts, except as follows:

Defendant claims that a flat car stood on the switch track, immediately in front of the plaintiff's home, and that the plaintiff, when he strayed away from his home, went under this flat car, and that when Black loosened the car at the coal shaft so that it ran down the grade of the switch track, it struck the car under which the plaintiff was situated, and set it in motion, and that it was this last-mentioned car which ran over the plaintiff and injured him. The defendant further claims that at the time of the injury none of the employes of the defendant of the Carbon coal and mining company could from his position have seen that the plaintiff was on the track or in any danger, even if he had looked.

The following are also facts, as shown by the evidence:

1st. No one knew that the plaintiff was on the track of the railroad company at the time he was injured.

2d. The track and the land over which it was constructed belonged to the railroad company, and therefore the plaintiff at the time he was on the track was technically a trespasser.

3d. There was no fence or anything else between plaintiff's home and the railroad track to prevent the plaintiff from going upon the track, which was about one hundred feet from the plaintiff's home.

4th. Plaintiff was not injured by any direct or immediate act of any servant or employe of the railroad company, but was injured through the acts of the employes of the Carbon coal and mining company.

5th. And it is clear that the employes of the Carbon coal and mining company did not look before they loosened the car that caused the injury, to see that the track was clear so that it would not injure any person, but whether they could have seen the plaintiff or not, if they had looked, is disputed; but as there was some evidence introduced tending to show that they might have seen the plaintiff if they had looked, and as the court below sustained the demurrer to the evidence and refused to permit the evidence to be considered by the jury, we must take it as a fact in the case that the employes of the Carbon coal and mining company could have seen the plaintiff on the track if they had looked along the track before they unloosened the car.

These we think are substantially all the facts in the case; and upon these facts, is the railroad company liable? The defendant claims that it is not liable: First, because the injury to the plaintiff was not produced by any negligence of either the defendant or of the Carbon coal and mining company; second, because, even if the Carbon coal and mining company was negligent, still, that the defendant is not liable therefor; and third, because, even if the plaintiff was injured through the negligence of either the defendant or of the Carbon coal and mining company, still, that he cannot recover, on account of the contributory negligence of his parents and custodians.

The defendant seems to admit that the plaintiff himself was too young to be charged with contributory negligence; and the question whether the parents and custodians of the plaintiff were guilty of contributory negligence may also be eliminated from the case; for, as before stated, the question was not submitted to the jury, but was decided by the court, and therefore, unless we can say as a matter of law, that they were guilty of negligence, we cannot say that the court below decided the case correctly as to this question; that is, unless we can say that the failure on the part of the parents of the plaintiff to keep him away from the railroad track was *per se* culpable negligence, contributing to the injury, we cannot say that the court below committed no error in taking the case from the jury, because of any supposed negligence of the parents of the plaintiff in permitting him unconsciously to enter upon the railroad track. We cannot say that the parents were thus guilty of negligence. Indeed, if we were examining the case as a juror must examine it, and as a question of fact instead of as a question of law, as we are now considering it, we do not think that we could say that the parents of the plaintiff were guilty of culpable negligence. The parents were in moderate circumstances. The father was a miner, and was working, at the time of the injury, in a coal shaft at the place where the car that did the injury was loaded; and the mother was at home attending to her household affairs; and the boy left the house without her knowledge only about three minutes before he was injured. Ordinarily the parents were very careful to keep their children away from the railroad track, and it was without their permission and against their will that their children at any time went upon the track. This would seem to be sufficient to exempt them from the charge of negligence, even if the question were to be viewed as a question of fact, and as a jury should consider it, and not as a question of law, where we are asked to decide affirmatively that the parents' acts were legal negligence. The court below certainly erred, if it decided this question in favor of the defendant.

This leaves two questions still to be considered: First, were the employes of the Carbon coal and mining company negligent? And second, is the railroad company liable for its negligence?

We think, as the question is presented to us, we must hold that the employes of the Carbon coal and mining company were negligent. As the case is presented to us, we must consider everything as proved which the evidence of the plaintiff tended to prove. We must not only consider that the employes of the Carbon coal and mining company did not look to see that the track was clear before they loosened the car that did the injury, but also that they could have seen the plaintiff on the track if they had looked; and the fact of not looking, under such circumstances—or, in other words, the failure to look—we must hold was

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negligence. It must be presumed conclusively that the Carbon coal and mining company, as well as the railroad company, was acquainted with the vicinity where the injury occurred, and with all its surroundings. It must be conclusively presumed that both companies were acquainted with the character of the railroad track, its down grade, that it was situated near a city, in a populous neighborhood, and that children were occasionally found upon the track; and under such circumstances, we think it was negligence for the employes of the Carbon coal and mining company not to look before they set the car in motion which did the injury. All persons are required to do business with reference to all the known surroundings; and while we do not think that either the railroad company or the Carbon coal and mining company was required to have a watchman to keep the track clear or to warn persons of danger, yet we would think that the general obligations, we are all under, to avoid injury to others wherever we reasonably can, would require the company, when about to move a car, to exercise at least that slight degree of precaution which consists merely in looking ahead to see that the track is clear before setting in motion a loaded car and allowing it to run with great force down a steep grade, without any means of stopping it until it reaches the bottom of the grade. To allow cars to be run in such a manner, under circumstances similar to those surrounding the present case, would often result in injury to individuals; and to run cars in such a manner under such circumstances shows a wanton disregard for the safety of others. In support of these views, we refer to the following authorities: *Frick v. The St. Louis, &c., R. R. Co.*, 5 Mo. App. 435; *Johnson v. Chicago, &c., R. R. Co.*, 49 Wis. 529; same case in 1 *American & English Railroad Cases*, 155, 157, 158, and cases there cited; *Cheney v. N. Y. C., &c., R. R. Co.*, 16 Hun, 415.

If the facts of this case were as they are claimed to be by the defendant, then the following authorities would probably apply, and the defendant would probably not be liable: *Ostertag v. The Pacific R. R. Co.*, 64 Mo. 421; *P. & R. R. Co. v. Hummell*, 44 Pa. St. 375.

The next question is, whether the railroad company is responsible under the circumstances of this case for the negligence of the employes of the Carbon coal and mining company? We think it unquestionably is. (*K. P. Ry. Co. v. Wood*, 24 Kas. 619; *K. C. Ry. Co. v. Fitzsimmons*, 22 Kas. 686; *Railroad Company v. Brown*, 84 U. S. 445; *Taylor v. W. P. R. R. Co.*, 45 Cal. 323; *Bower v. B. & S. R. R. Co.* 42 Iowa, 546; *Chicago, &c., Ry. Co. v. McCarthy*, 20 Ill. 385; *Lowell v. B. & L. R. R. Co.*, 40 Mass. 24.) The railroad company owned the entire railroad property and had the entire possession and control thereof, and simply permitted the Carbon coal and mining company to load coal into the

cars of the railroad company, and to allow the cars to run down on the steep grade of the railroad switch to the level portion thereof. The Carbon coal and mining company had no control of the switch or of the cars, except as permitted by the railroad company, and had no control of any of the engines of the railroad company. The railroad company with its own engines moved the cars to the place where the Carbon coal and mining company desired to load them, and the Carbon coal and mining company had nothing to do but load them and let them loose as aforesaid; therefore whatever was done in the way of moving the cars by the Carbon coal and mining company, or by its agents and employes, was in fact done by the railroad company itself; and whatever negligence intervened in such removal, was the negligence of the railroad company. Besides, it is a general principle of law that a railroad company cannot escape the performance of any duty or any obligation imposed upon it by its charter or by the general laws of the state by voluntarily surrendering its road or the control thereof into the hands of others; and whether it operates its road itself, or whether it permits others to do it, it is generally liable for all injuries resulting from the negligent management or negligent operation of the road. It is a duty resting upon all railroad companies to see that their roads are properly managed and properly operated; and where they are not so managed and so operated, the companies must be held responsible therefor.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

See *Fitzpatrick v. Fitchburg R. R. Co.*, 1 Am. & Eng. R. R. Cas. 154; *Johnson v. Chicago, etc., R. R. Co.*, Id. 155; *Cauley v. Pittsburg, etc., R. R. Co.*, 2 Am. & Eng. R. R. Cas. 4; *Maschek v. St. Louis, etc., R. R. Co.*, Id. 38.

The degree of caution required of a child is to be measured by its maturity and capacity, and depends upon the age and knowledge of the child. *R. R. Co. v. Gilman*, 15 Wall. 401; *Robinson v. Cone*, 22 Vt. 218; *R. R. Co. v. Snyder*, 18 Ohio St. 899; *R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Daly v. R. R. Co.*, 26 Conn. 591. The precise minimum age at which a child suffered to go at large will be regarded as negligence per se, varies in the different States. Thus in Missouri it has been held that it is not negligence in permitting a child under three years of age to go out under the care of one of eight years of age. *O'Flaherty v. Union R. R. Co.*, 45 Mo. 70; that a child two years of age is competent to go at large, *Boland v. Missouri R. R. Co.*, 36 Mo. 484. In New York and Massachusetts it has been held to be negligence to permit children from seventeen months to six years of age to go unattended. *Hartfield v. Roper*, 21 Wend. 615; *Krieg v. Wells*, 1 E. D. Smith, 74; *Callehan v. Bean*, 9 Allen, 401. In New York a child of nine years has been pronounced a suitable attendant for one three years of age. *Ihl v. Forty Second St. R. R. Co.*, 47 N. Y. 817, and in Massachusetts a child of nine years was held a proper attendant, *Mulligan v. Curtis*, 100 Mass. 512. In Michigan a child of twelve years and six months in charge of one a little over four years of age, and in Illinois one of six in company of another about ten years of age

was held not to be negligence, *East Saginaw, etc.*, R. R. Co. v. Bohu, 27 Mich. 508; *Chicago, etc.*, R. R. Co. v. Becker, 84 Ill. 488. In Maryland it was held not to be negligence to send a child five years and nine months of age upon an errand which obliged him to cross the track, *McMahon v. Northern Central R. R. Co.*, 89 Md. 438. See also *Schierhold v. North Beach, etc.*, R. R. Co., 40 Cal. 447; *Karr v. Parks*, 40 Cal. 188; *Chicago, etc.*, R. R. Co. v. Starr, 42 Ill. 174; *Pittsburg, etc.*, R. R. Co. v. Vining, 27 Ind. 513; *Jetter v. N. Y.*, etc., R. R. Co., 2 Abb. App. Cas. 458; *Lynch v. Smith*, 104 Mass. 58; *Oldfield v. Harlem R. R. Co.*, 14 N. Y. 810; *Barksdull v. New Orleans, etc.*, R. R. Co., 28 La. An. 180; *McGarry v. Loomis*, 68 N. Y. 104; *Pittsburg, etc.*, R. R. Co. v. Caldwell, 74 Pa. St. 421; *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 602; *Morgan v. Ill. and St. Louis Br. Co.*, 5 Dill. 96; *Nagle v. Allegheny Valley R. R. Co.*, 88 Pa. St. 85; *Donoho v. Vulcan Iron Works*, 7 Mo. App. 447; *Achtenhagen v. Watertown*, 18 Wis. 331; *Wright v. Malden, etc.*, R. R. Co., 4 Allen, 283; *Lafayette, etc.*, R. R. Co. v. Huffman, 28 Ind. 287; *Marchick v. St. Louis, etc.*, R. R. Co., 8 Mo. App. 600; *Jeffersonville, etc.*, R. R. Co. v. Bowen, 40 Ind. 545.

A child can only be required to exercise a degree of care expected from one of his age. What would be considered negligence in an adult will not be so regarded in a mere child lacking maturity and discretion. *Pennsylvania R. R. Co. v. Kelly*, 81 Pa. St. 372; *Phila., etc.*, R. R. Co. v. Spearan, 47 Pa. 800; *Glassey v. Hestonville, etc.*, R. R. Co., 57 Pa. St. 173; *Mahoney v. R. R. Co.*, 6 Phila. Rep. 242; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; *North Penna. R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Schmidt v. Milwaukee, etc.*, R. R. Co., 28 Wis. 186; *Chicago, etc.*, R. R. Co. v. Gregory, 58 Ill. 226; *Lafayette, etc.*, R. R. Co. v. Huffman, 28 Ind. 287; *R. R. Co. v. Stout*, 17 Wall. 657; *Boland v. Missouri, etc.*, R. R. Co., 36 Mo. 484; *Baltimore, etc.*, R. R. Co. v. State, 30 Md. 47; *Meyer v. Midland Pacific R. R. Co.*, 2 Neb. 319; *Rauch v. Lloyd*, 81 Pa. St. 358; *Elkins v. Borton, etc.*, R. R. Co., 115 Mass. 190; *Lynch v. Smith*, 104 Mass. 52; *Norfolk, etc.*, R. R. Co. v. Ormsby, 27 Gratt. 455; *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70; *Brown v. European, etc.*, R. R. Co., 58 Me. 384; *Walters v. Iowa, etc.*, R. R. Co., 41 Iowa, 71; *McMillan v. Burlington, etc.*, R. R. Co., 46 Iowa, 281; *Baltimore, etc.*, R. R. Co. v. State, 30 Md. 47; *Baltimore, etc.*, R. R. Co. v. McDonnell, 48 Md. 534; *McMahon v. Northern, etc.*, R. R. Co., 39 Md. 438; *O'Flaherty v. Union R. R. Co.*, 45 Mo. 70; *Chicago, etc.*, R. R. Co. v. Becker, 84 Ill. 488; *Chicago, etc.*, R. R. Co. v. Murray, 71 Ill. 601; *Pittsburg, etc.*, R. R. Co. v. Calderwell, 74 Pa. St. 421; *Phila., etc.*, R. R. Co. v. Long, 75 Pa. St. 257; *O'Mara v. Hudson, etc.*, R. R. Co., 38 N. Y. 445; *Reynolds v. N. Y. etc.*, R. R. Co., 58 N. Y. 248; *Haycrops v. Lake Shore, etc.*, R. R. Co., 64 N. Y. 636; *Thurber v. Harlem, etc.*, R. R. Co., 60 N. Y. 326; *McGovern v. N. Y. etc.*, R. R. Co., 67 N. Y. 417; *Casey v. N. Y.*, etc., R. R. Co., 78 N. Y. 518.

A child is not bound by the rule which requires one about to cross a track to stop and look and listen. *McGowen v. N. Y.*, etc., R. R. Co., 67 N. Y. 417; *Chicago, etc.*, R. R. Co., 84 Ill. 488. See also *Bellefontaine, etc.*, R. R. Co. v. Snyder, 24 Ohio St. 670; *Nagle v. Allegheny Valley R. R. Co.*, 88 Pa. St. 85. Neither is a child to be held accountable in the same degree as an adult trespasser. *Isabel v. Hannibal, etc.*, R. R. Co., 60 Mo. 475; *Hicks v. Pacific R. R. Co.*, 64 Mo. 480; *Lyons v. Brookline*, 119 Mass. 491; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St. 33; *Hughes v. Macfie*, 2 Hurl. & C. 744; *Lygo v. Newbold*, 9 Exch. 302; *Lynch v. Nurdin*, 1 Q. B. 29. But the company is not obliged to station an employe upon its cars to prevent children playing about them. *Hestonville, etc.*, R. R. Co. v. Connell, 88 Pa. St. 520; *Central Br., etc.*, R. R. Co. v. Henigh, 23 Kan. 847; where the company left dangerous machinery such as a turn table, unenclosed and unguarded it was held liable; *Railroad Co. v. Stout*, 17 Wall. 657. See also *Koons v. St. Louis, etc.*, R.

R. Co., 65 Mo. 592; Keffe v. Milwaukee, etc., R. R. Co., 21 Minn. 207; Kansas, etc., R. R. Co. v. Fitzsimmons, 22 Kan. 686; St. Louis, etc., R. R. Co. v. Belle, 81 Ill. 76; Central Br., etc., R. R. Co. v. Henigh, 28 Kan. 847; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269.

Where a child is upon the track and cannot be seen by the employes in time to stop the train the company is not liable; Bulger v. Albany R. R. Co., 42 N. Y. 459.

Schwier v. N. Y., etc., R. R. Co., 15 Hun. 572; Phila., etc., R. R. Co. v. Spearen, 47 Pa. St. 300; Phila., etc., R. R. Co. v. Hummel, 44 Pa. St. 375; Phila., etc., R. R. Co. v. Long, 75 Pa. St. 257; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; Walters v. Chicago, etc., R. R. Co., 41 Iowa 71; Meyer v. Midland Pacific R. R. Co., 2 Neb. 319; Morrissey v. Eastern R. R. Co., 126 Mass. 377; Mauby v. Wilmington, etc., R. R. Co., 74 N. C. 655. See also Hestonville, etc., R. R. Co. v. Connell, 88 Pa. St. 520; Brown v. European, etc., R. R. Co., 58 Mo. 384; Pennsylvania, etc., R. R. Co. v. Morgan, 83 Pa. St. 184; Chicago, etc., R. R. Co. v. Becker, 76 Ill. 25.

Thus where a child was playing in a ditch two feet eight inches deep, left open for the purpose of carrying off surface water, and was thereby concealed from view of the engineer until too late to stop the train, and was injured, the company was held not liable; Meyer v. Midland Pacific R. R. Co., 2 Neb. 320.

But if there be any negligence on the part of the employes in charge of the train then the company is liable; R. R. Co. v. Gladmon, 15 Wall 401; Pennsylvania R. R. Co. v. Morgan, 82 Pa. St. 184; North Penna. R. R. Co. v. Mahony, 57 Pa. St. 187; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; Rauch v. Lloyd, 31 Pa. St. 358; Pennsylvania R. R. Co. v. Kelly, 31 Pa. St. 372; Hicks v. Pacific R. R. Co., 64 Mo. 480; Isabel v. Hannibal, etc., R. R. Co., 60 Mo. 475; Thurber v. Harlem, etc., R. R. Co., 60 N. Y. 326; Babrenburgh v. Brooklyn, etc., R. R. Co., 56 N. Y. 652; Walters v. Chicago, etc., R. R. Co., 41 Iowa 71; Manly v. Wilmington, etc., R. R. Co., 74 N. C. 655; Daly v. Norwich, etc., R. R. Co., 26 Conn. 591; Chicago, etc., R. R. Co. v. Dewey, 26 Ill. 259; Pittsburg, etc., R. R. Co. v. Bumstead, 48 Ill. 221; Norfolk, etc., R. R. Co. v. Ormsby, 27 Gratt. 445. Thus a failure to comply with statutory requirements; Schmidt v. Milwaukee, etc., R. R. Co., 28 Wis. 186; Isabel v. Hannibal, etc., R. R. Co., 60 Mo. 475; Williams v. Great Western Ry. Co., L. R. 9 Exch. 157.

The absence of a brakeman who could have stopped the car; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; where the child was seen in time to stop the train; Isabel v. Hannibal, etc., R. R. Co., 60 Mo. 475; Walters v. Chicago, etc., R. R. Co., 41 Iowa 71.

Where the engineer sees a child in the act of leaving the track, and there is ample time for him to do so, there is no negligence in him not stopping the train. Pennsylvania R. R. Co. v. Morgan, 82 Pa. St. 184; Chicago, etc., R. R. Co. v. Becker, 76 Ill. 25.

As to whether the parents of a child are guilty of negligence in permitting it to go unattended to the place where the injury happened, is a question of fact for the jury. Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49; Lynch v. Smith, 104 Mass. 53; Mulligan v. Curtis, 100 Mass. 512; Schierhold v. North Beach, etc., R. R. Co., 40 Cal. 447; Waits v. Northwestern Ry. Co., El. Bl. and E. 719; Oldfield v. Harlem R. R. Co., 14 N. Y. 310. Callahan v. Bean, 9 Allen, 557; Boland v. Missouri R. R. Co., 86 Mo. 484; Robinson v. Cone, 22 Vt. 213; Commonwealth v. Metropolitan R. R. Co., 107 Mass. 236; Hunt v. Salem, 121 Mass. 294; Mangam v. Brooklyn, etc. R. R. Co., 88 N. Y. 455; Ihl v. Forty-second St. R. R. Co., 47 N. Y. 317; Prendegast v. N. Y., etc., R. R. Co., 58 N. Y. 652; Fallon v. Central, etc., R. R. Co., 64 N. Y. 13; Haycroft v. Lake Shore, etc., R. R. Co., 64 N. Y. 636; Jetter v. N. Y. etc., R. R. Co., 2 Abb. App. Cas. 358; Pittsburg, etc. R. R. Co. v. Pearson, 72 Pa. St.

169; Pennsylvania R. R. Co. v. Lewis, 79 Pa. St. 33; Pittsburg, etc. R. R. Co. v. Bumstead, 48 Ill. 221; Chicago, etc., R. R. Co. v. Gregory, 58 Ill. 226.

As to the inability of the parents, on account of the want of means, to provide a suitable attendant for their children, see Chicago v. Major, 18 Ill. 349; Pittsburg, etc. R. R. Co. v. Bumstead, 48 Ill. 221; Chicago, etc., R. R. Co. v. Gregory, 58 Ill. 226; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; O'Flaherty v. Union R. R. Co., 45 Mo. 70; Phila. etc., R. R. Co. v. Long, 75 Pa. St. 257; Walters v. Chicago, etc., R. R. Co., 41 Iowa, 71; Kay v. Parks, 40 Cal. 188.

As to the effect of the pursuance of the person in whose charge the child is at the time of the injury. Stillson v. Hannibal, etc., R. R. Co., 67 Mo. 671; Holly v. Boston Gas Co., 8 Gray, 132; Ohio, etc., R. R. Co. v. Stratton, 78 Ill. 88; North Penna. R. R. Co. v. Mahony 57 Pa. St. 187; Pittsburg, etc. R. R. Co. v. Caldwell, 74 Pa. St. 421; Morrison v. Erie R. R. Co., 56 N. Y. 302; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; East Saginaw, etc., R. R. Co. v. Bohn, 27 Mich. 503; Bellefontaine R. R. Co. v. Snyder, 18 Ohio St. 399; Waite v. North Eastern Ry. Co., El. Bl. and E. 719.

Where the parent by his negligence has contributed to the injury, he cannot recover. Isabel v. Hannibal, etc., R. R. Co., 60 Mo. 475; Ohio, etc., R. R. Co. v. Stratton, 78 Ill. 88; Koons v. St. Louis, etc., R. R. Co., 65 Mo. 592; Daly v. Norwich, etc., R. R. Co., 26 Conn. 591; Bellefontaine, etc., R. R. Co. v. Snyder, 18 Ohio St. 399; Baltimore, etc., R. R. Co. v. Tryer, 30 Md. 47; Waite v. North Eastern Ry. Co., El. Bl. and E. 719; Walters v. Chicago, etc., R. R. Co., 41 Iowa, 71; Albertson v. Keokuk, etc., R. R. Co., 48 Iowa, 392; Hesterville, etc., R. R. Co., 57 Pa. St. 172; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; Pittsburg, etc. R. R. Co. v. Pearson, 72 Pa. St. 169; Philadelphia, etc., R. R. Co. v. Long, 75 Pa. St. 257.

But the negligence of the parent or custodian will not prevent the child recovering. Bellefontaine R. R. Co. v. Snyder, 18 Ohio St. 399.

TOWNLEY, by Guardian ad litem,

v.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

(*Advance Case, Wisconsin. December 13, 1881.*)

A railroad company is bound to provide for a careful lookout in the direction in which a train is moving, in places where people, and especially where children, are likely to be upon the track.

Negligence is generally a question of fact for the jury; and, upon the evidence in this case, (stated in the opinion,) it was error to take the question of defendant's negligence from the jury by nonsuiting the plaintiff.

Although the statute (section 1811, Rev. St.) makes it unlawful for a person, not connected with or employed upon a railroad, to walk along the track thereof, "except when the same shall be laid along public roads or streets," yet, where the question is whether a person, injured while walking upon a railroad track, was guilty of a want of ordinary care, it is error to reject evidence showing that many persons, men, women, and children, had, for years before the accident in question, been in the habit of passing, daily and hourly, up and down, in the same pathway on which the injured person was passing,—since such testimony would tend to show a license, or to repel the

inference of a want of ordinary care, and also to show a lack of such care on defendant's part as the facts required.

Ordinary care is such care as would ordinarily be exercised by persons of the age and in the situation of the person sought to be charged with negligence; and the fact that the person injured was a child of tender years is to be considered in determining the question of contributory negligence.

The evidence in the record held not sufficiently conclusive of contributory negligence to justify a nonsuit.

A certificate to the bill of exceptions, stating that "the foregoing is the substance of all the testimony given on the trial," held sufficient to show that there was no other evidence to justify the nonsuit.

APPEAL from Circuit Court, Dane County.

This action is to recover damages for an injury resulting in the loss of a foot of the plaintiff, Rosa, caused by the alleged negligence of the defendant, March 10, 1879. At the time of the injury Rosa was seven years of age, and had, during the day, been attending the School of the Sisters, on Washington Avenue, leading directly from the capitol to the east end of the passenger depot of the Prairie du Chien division of the defendant's road. Rosa's home seems to have been some 40 or 50 rods west of the depot, and a little north of the defendant's track. Immediately south of the depot is the main track, and upon the north side of the depot there are four side-tracks; the two nearest the depot running together about 240 feet west of the depot, and from thence on one track about 100 feet to the main track. The third and fourth tracks from the depot, known as the coal and lumber tracks, run together at the switch about 360 feet west of the depot, being at the place where Rosa was injured, and which, for convenience, is called "switch B," and from thence on one track 64 feet to the main track, which, for convenience, is called "switch A."

Along the north side of the north side-track there is a travelled road or wagon track running from Washington Avenue, near the east end of the depot, west across the end of Francis Street, and thence west to the end of Lake Street, on the west side of which Rosa lived. On leaving her school on the day in question, Rosa passed down the avenue across the side-tracks on to the platform at the east end of the depot, and from thence along the platform on the south side of the depot went on to the walk or "switch path," so called, between the main and side tracks west of the depot. While she was on the "switch path," the freight train in question passed from east of the depot along the side track nearest the depot on the north, and from thence on to the main track, until the hind end of the hind car was about the distance of one and a half cars west of "switch A," when the train stopped. There were eight freight cars in the train, the four in front being loaded, and the four in the rear being empty, and the brakeman and switchman were both on the train as it passed west, the former seeing and recognizing Rosa on the "switch path" as he passed by her.

Immediately after the train had passed, Rosa walked west along the "switch path" to the junction of the side track with the main track, and then, turning a little northward, crossed the first side track, and then continued, in about the same direction, until she reached the junction of the coal and lumber tracks at or near "switch B," and crossing the same, until she came to the north rail of the coal track, when her left foot got caught between that rail and the guard-rail, and from which she was unable to extricate it. "Switch A," something over 64 feet west of her, being turned, and the train starting back, and the four rear cars being uncoupled, run on to the north side track, and from thence east to "switch B," and there turned on to the coal track and crushed her foot being so caught. On the trial, the plaintiff having rested, the defendant moved for a nonsuit, which was granted, and from the judgment entered thereon this appeal is brought.

Sloan, Stevens & Morris, for appellant. J. W. Cary, for respondent.

CASSODAY, J.—Was there an absence of negligence on the part of the defendant? There is evidence tending to show, in effect, that the yard-master saw Rosa standing still on the track at or near "switch B," the place where she was caught, before the cars started back, and that he was, at the time, about 220 feet east of her, with the cars over 100 feet west of her, and that he, knowing she was in danger, hallooeed to the train men at the time, and again when the cars got within about 60 feet of her, or opposite "switch A," where the switchman stood; that she was on the same side of the track as the lever of "switch A;" that when the train stopped going west, with the rear end of the rear car some 50 feet west of "switch A," the brakeman got down from the top of the cars and uncoupled the four rear cars, and then got upon the west end of the uncoupled car furthest from the little girl, and took hold of the brake at the west end of that car, with his face towards the west, and that in the mean time the switchman had got down from the top of the cars and passed to the lever of "switch A," some 64 feet west of where the little girl was injured, and then turned that switch so as to send the four uncoupled cars on to the north side track, and thence on to the coal track at or near "switch B," where the little girl was injured, and thereupon, and after looking to see if "switch B" was set so as to turn the loose cars on to the coal track, the switchman signalled the engineer of the train to back the same, which he did.

From portions of the testimony it seems to be a little uncertain whether the signal to back the train was before or after the switchman looked down the track to "switch B." He does testify, in effect, that when he looked back—down the track—to "switch B," he did not see the little girl; that she might have been on this side

of the track, and he would not have noticed her, as he would be watching his switch—the lumber-yard switch that goes on to the coal track; and that when he first saw her her hands were up and the end of the car within a half car length of her. The switchman also testified: “It is my duty to look up on that track to see if it is clear, and if it is perfectly safe for the cars to come back; that is what I am there for. And after I see that it is safe, I give the signal to back. It is my duty to see that the track is clear; that there is nobody on it. That is what I did this time.” With this measure of duty resting upon the servants of the defendant, at the time and place in question, we cannot hold as a matter of law, upon the evidence in the case, that the defendant was free from negligence in committing the injury. If this little girl, seven years of age, was at or near “switch B,” with her foot caught between the rail and the guard, while the train was standing still, and it was his duty to see that the track was clear and nobody on it before giving the signal for the train to back, then certainly there was some evidence of failure of duty on his part in not discovering her and removing her from the track before giving the signal.

We do not wish to be understood as expressing any opinion on the facts, except that, on the question of defendant's negligence, there was evidence sufficient to go to the jury. Whether the little girl was in fact on the track at the time of turning the switch or giving the signal, or whether the switchman ought to have seen her before giving the signal, or immediately after, and then given the alarm sooner than he did, or have rescued her by his own efforts, or whether the yard-master should have gone to her relief when he first saw she was in danger, or whether the brakeman acted with all the circumspection which his duty required, were, in our opinion, all questions peculiarly within the province of the jury.

In *Ireland v. Plank-road Co.*, 13 N. Y. 533, Johnson, J., said: “It by no means necessarily follows, because there is no conflict in the testimony, that the court is to decide the issue between the parties as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement, which is consistent throughout.”

“Generally, what is and what is not negligence is a question for the jury. When the standard of duty is a shifting one, a jury must determine what it is, as well as find whether it has been complied with.” *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 263.

"Negligence, in one sense, is a quality attaching to acts dependent upon and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations." *T. and P. Ry. Co. v. Murphy*, 46 Texas, 366. See, also, *Smith v. Fletcher*, L. R. 9 Exch. 64; *Bridges v. Co.*, L. R. 7 E. and I. App. Cases, 213; *Kenworth v. Ironton*, 41 Wis. 647; *Langhoff v. Ry. Co.*, 19 Wis. 479; *Spencer v. Ry. Co.*, 17 Wis. 487; *Thurber v. Ry. Co.*, 60 N. Y. 326; *Frick v. Ry. Co.*, 5 Mo. App. Cases, 435.

In *Langhoff v. Ry. Co.*, Dixon, C. J., said: "It [negligence] is not a fact to be testified to, but can only be inferred from the res gestæ—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact to be drawn by the jury under proper instructions from the court. It is always so where the facts, or, rather, the conclusion, is fairly debatable, or rests in doubt."

Judge Cooley discusses this question in his work on Torts, and concludes: "If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute." Page 670.

We are clearly of the opinion that the facts disclosed in the record do not bring the case within the rule authorizing the court to take the question of the defendant's negligence from the jury. It seems to be pretty well settled that a railroad company must provide for a careful lookout in the direction that the train is moving, in places where people, and especially where children, are liable to be upon the track. If they do not, and a person has been injured, then the company may, in the absence of contributory negligence, be held liable. *Butler v. Ry. Co.*, 28 Wis. 487; *Ewen v. Ry. Co.*, 38 Wis. 613; *Farley v. Ry. Co.*, 9 N. W. Rep. 230; *Frick v. Ry. Co.*, 5 Mo. App. 435; *Oheney v. Ry. Co.*, 16 Hun, 415.

2. Was the plaintiff guilty of contributory negligence? It is urged that the plaintiff, Rosa, was violating the last clause of section 1811, Rev. St., in walking upon the "switch path," and in attempting to cross the side tracks as she did, and that, therefore, there can be no recovery. The clause does make it unlawful for a person, not "connected with or employed upon the railroad, to walk along the track or tracks of any railroad, except when the same shall be laid along public roads or streets." This section seems to have been designed to prevent persons walking upon or between the rails of the track, or so near thereto as to be in danger of being struck by passing trains; but we do not think it is

applicable to persons passing directly from Washington avenue in question on to the platform of the depot in question, and thence along that platform on to the "switch path," and from there across the side tracks to the public streets beyond. We must, therefore, determine this appeal as though that provision had not been enacted, for the exception in case the track is laid along public roads or streets is to have some effect.

Under a similar statute in Missouri it has quite recently been held that "though it is unlawful for one not connected with a railroad to walk upon its tracks, and it is presumed that every one will obey the law, yet this will not relieve the railroad corporation from the duty of keeping a careful lookout while running its trains upon the streets of a city." *Frick v. Ry. Co.*, 5 Mo. App. 425. With that proposition we fully concur. See, also, *Daley v. Ry. Co.*, 26 Conn. 591. The brakeman testified in effect that he had seen the little girl in the yard before, and had seen other children there, and had ordered them off the track; that there was a pathway where the little girl went; and that since he had worked there he had seen people going across the tracks on to the streets—had seen them all the time for the last seven years, men, women, and children. The plaintiff also offered to prove, in effect, that persons living near the track west of the depot, and other people, men, women, and children, had, for some years immediately before the accident, been in the habit of passing back and forth, up and down, on the same pathway and in the same direction where the little girl went at the time she was hurt, and that they had been so accustomed to pass, daily and hourly, for several years; all of which was excluded, and exceptions taken.

This excluded evidence tended to prove an implied consent or license on the part of the defendant that persons might pass on foot along the "switch path" and across the side tracks to the public streets; and the mere fact that other children had been ordered off the track would not conclusively prove that no such consent or license had been granted. If such custom existed, and men, women, and children were daily and hourly passing over the same pathway, it certainly had an important bearing, not only upon the question whether Rosa was guilty of contributory negligence at the time, but whether the defendants were exercising ordinary care at the time. If men, women, and children were daily and hourly passing, the servants of the defendant in charge must have known the fact, and hence were called upon to exercise more vigilance and care than though such passage seldom occurred. If all classes of people, men, women, and children, and especially those living up the track in the vicinity of Rosa's home, were accustomed hourly and daily to pass over this pathway, then can we say, as a matter of law, that there was a lack of ordinary care in Rosa in attempting to do the same thing? Certainly not, unless

her tender years were such as to impute negligence to her parents for allowing her to be upon the track at all.

The case is quite similar in principle to *Johnston v. Ry. Co.*, 49 Wis. 529, [S. C. 5 N. W. Rep. 886,] where the boy killed was only six years of age, and the judgment of nonsuit was reversed. It has frequently been held that a child of tender years is not to be held to the same rule of care and diligence in avoiding the consequences of the negligent or unlawful acts of others, that is required of persons of full age and capacity. *Pennsylvania R. R. Co. v. Kelley*, 31 Pa. St. 372; *Ranch v. Lloyd*, 31 Pa. St. 358; *Glassey v. Ry. Co.*, 57 Pa. St. 172; *Pittsburgh Ry. Co. v. Coldwell*, 74 Pa. St. 421; *East Saginaw Ry. v. Bohn*, 27 Mich. 503; *Bellefontaine Ry. v. Snyder*, 18 Ohio St. 399; *Robinson v. Cane*, 22 Vt. 213; *Railroad Co. v. Stout*, 17 Wall, 657; *Boland v. Ry. Co.*, 36 Mo. 484; *Chicago Ry. v. Gregory*, 58 Ill. 226; *McMillan v. Ry. Co.*, 46 Iowa, 231.

In *Lynch v. Nurdin*, 1 Q. B. 29, the plaintiff was but seven years of age, and at the time of the injury was committing a trespass by getting upon the defendant's cart hitched to his horse, and which had been negligently left by him in the street unattended, and Lord Denman, C. J., said: "Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation, and this would evidently be very small, indeed, in so young a child. But this case presents more than the want of care; we find it in the positive misconduct of the plaintiff—an active instrument towards the effect." Page 36. He then reviews the authorities, and concludes that "for these reasons we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur." For these reasons we think the evidence offered was improperly excluded, and that no such want of care was shown on the part of the plaintiff as to justify the court in taking the case from the jury.

3. But counsel contend that the bill of exceptions is not certified to contain all the evidence, and that we must therefore presume that there was other evidence not before us which justified the nonsuit. The certificate is in these words: "The foregoing is the substance of all the testimony given on the trial of said action." The learned counsel for the railroad company has referred us to quite a number of Iowa cases holding similar certificates insufficient. But this is a question of practice, and, with great deference for the Iowa court, we feel justified in following our own decisions. Besides, we think the distinction made by that court is a little too refined for practical purposes. Here, the trial judge certifies, in effect, that the bills of exceptions contains "the substance of all the testimony" upon which he granted the nonsuit, and yet we are asked to find that he must have granted it upon

some other testimony. To so hold would, in our judgment, disregard substance for mere form. It would be wholly impracticable, if not impossible, for any one to procure an exact transcript of every particle of testimony taken upon a trial. It must, at most, be "the substance of all the testimony," and a certificate going further must necessarily trench upon the impracticable, if not the impossible. This, we think, is in harmony with the decisions of this court, if not supported by them, and we must therefore hold that, practically, the bill of exceptions is certified to contain all of the testimony given on the trial.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

See note, p. 573.

MOORE AND WIFE

v.

PENNSYLVANIA R. R. Co.

(*Advance Case. Pennsylvania. January 24, 1882.*)

Railroad companies are not liable for injuries inflicted by passing trains upon persons walking upon the tracks of the company. Nor does it make any difference that those persons are of tender years. Companies owe no greater measure of duty to them than to adults.

In an action by parents against a railroad company to recover damages for the death of their child, they proved that the deceased was killed by a fast express train while walking upon the track of the company, defendant's road. The child was nearly ten years of age and was bright and intelligent. The court, on application of the defendant company, granted a non-suit. *Held*, on error, that this was not error.

ERROR to the Court of Common Pleas, No. 3 of Philadelphia County.

Trespass by Thomas Moore and Mary, his wife, against the Pennsylvania Railroad Company to recover damages for the death of their minor son, Thomas B. Moore, which plaintiffs alleged was caused by the negligence of the defendant company's servants.

On the trial of the case before Ludlow, P. J., the plaintiffs proved the following facts: Thomas B. Moore and wife lived on Trenton avenue, just north of its intersection with Orthodox street, in a populous suburb of the city of Philadelphia. The tracks of the company defendant were laid upon Trenton avenue, but there was a sufficiently wide sidewalk and roadway on either side of the track to accommodate passengers.

On April 30, 1879, between eight and halfpast eight o'clock in the evening, Mrs. Moore sent her son, Thomas B. Moore, a bright,

intelligent lad, nearly ten years of age, to make certain purchases at a store in Orthodox street. He turned southwards on Trenton avenue and began to walk in that direction.

The only witness of the accident which ensued testified that he was standing on the opposite side of Trenton avenue from that on which the boy was walking. That he noticed a train coming from the south on the track on his side of the street, and just as it got abreast of him discovered the Cincinnati Express approaching very rapidly from the north on the track on the other side of the street. That he thereupon at once squatted to see if the track on the other side of the street was clear and there saw the boy, Thomas B. Moore, walking southward along the outside of the sleepers, about twenty-five feet north of a telegraph pole by the side of the track. The express then was right on him. In a moment it struck him, threw him against the telegraph pole above referred to and killed him.

The company defendant asked for a non-suit, which was granted by the court. Subsequently an application to take off this non-suit was refused by the court in banc, whereupon plaintiffs took this writ, assigning for error the granting of the non-suit.

Macgregor J. Mitchison, for the plaintiff in error, cited *Catawessa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Penna. R. R. Co. v. Kelly*, 31 Pa. St. 372; *Phila. and Trenton R. R. Co. v. Hogan*, 47 Pa. St. 244; *Reeves v. Del. and Lack. and West. R. R. Co.*, 30 Penna. St. 454; *Phila. City R. R. Co. v. Hassord*, 75 Pa. St. 367; *West Chester and Phila. Railroad Co. v. McElwee*, 67 Pa. St. 311; *Pa. R. R. Co. v. Ackerman*, 74 Pa. St. 265; *B. and O. R. R. Co. v. Fryer*, 30 Md. 47; *Beers v. Housatonic R. R.*, 19 Conn. 566; *Robinson v. Cone*, 22 Vt. 225; *Pendrill v. Second Ave. R. R. Co.*, 43 How. 409; *Johnson v. Bremer*, 61 Smith, 58; *T. and W. R. R. Co. v. Harman*, 47 Ill. 278; *Daly v. Norwich and Worcester R. R. Co.*, 25 Conn. 595; *Penna. R. R. Co. v. Lewis*, 79 Pa. St. 43.

Hon. Wayne MacVeagh, for the defendant in error, cited *Cauley v. Pitts, Cinn. and St. Louis R. R. Co.*, 2 Am. and Eng. R. R. cases, 4.

Jan. 23, 1882, The Court: The only evidence in this case as to the position of the deceased when he was struck was that given by the plaintiffs' witness. He testified: "The boy was on the outer side, on the end of the sleepers, walking at twenty to twenty-five feet north of the telegraph pole; he was walking from sleeper to sleeper when I saw him; it was about a second of time from my sight of him when he was struck." He also said "the lad was twenty or twenty-five feet north of telegraph pole when struck . . . walking on outer edge of sleeper toward Orthodox street. Trees are planted in front of houses; there is a sidewalk and trees outside; there is a three or three and a half foot walk for passen

gers to Orthodox street." At another place he testified, "I squatted down to look under train running up and saw boy on outer end of sleepers walking; the train then was right on him; train struck him." The foregoing being the only testimony as to what the boy was doing at the moment he was struck, it was affirmatively established and entirely undisputed that the deceased was walking on and along the track at the time of the accident. He was not on the track at a public crossing, nor was he in the act of crossing. It is true that the railroad track at this place was laid upon the bed of a public street, and hence the right to cross it was not limited to the highway or street crossings. But the boy was walking *along* the track, and not across it, when he was struck. This he clearly had no right to do. There was an ample sidewalk and roadway for all foot passengers and others desiring to proceed in the same direction with the railroad. The boy was sent on an errand to a store on Orthodox street. He had not yet reached that street, but was going toward it. Instead of walking on the foot-walk at the side of the street, or even in the roadway until he reached Orthodox street, and then crossing the railroad track, he appears to have diverged from both, if he was at any time upon either, and of that there is no evidence, and walked upon the cross-ties of the railway. This, at least, is all that appears in the testimony given by the plaintiffs, of which there is no contradiction. Of course, in such circumstances he was a trespasser, and not only put himself in peril by his rashness, but also endangered the safety of any passing train, and the lives of passengers. We have so frequently held that in such circumstances there can be no recovery, that it is unnecessary to quote the authorities. As the testimony was entirely undisputed, it was the duty of the court to pass upon it, which they did by directing a non-suit. In this there was no error. The circumstance that the trespasser in this instance was a boy, ten years of age, cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks. In *Railroad v. Hummell*, 8 Wr., the rule was applied to the case of a child seven years old. And so, also, in the latest case of the kind that has been before us, *Cauley v. Railroad*, 2 Am. and Eng. R. R. Cas., 4, the rule was in no wise relaxed, although the person injured was a boy of tender years. In the first of these cases we used the following language, having reference to the facts in evidence: "But if the use of a railroad is exclusively for its owners or those acting under them, if others have no right to be upon it, if they are wrong doers whenever they intrude. The parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to; but they have a right to presume and act on the presumption that those in

the vicinity will not violate the laws; will not trespass upon the right of a clean track; that even children of tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardian. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. This language is entirely appropriate to the present case, with the added force, derived from the testimony of one of the plaintiffs that the deceased, his son, was a bright, intelligent boy, strong and healthy, and of rather exceptional capacity, and nearly ten years of age. If the rule against trespassers on railway tracks is made to depend upon the intelligence and age of the trespassers it is easy to see that the law upon that subject will very soon become involved in inextricable confusion. Seeing no error in this record—

The judgment is affirmed.

Opinion by GREEN, J.

TRUNKY and STEVETTE, J. S., dissent.

The questions raised in this case are very simple and do not require elaborate discussion. The following note will therefore be little more than a collection of the most important cases bearing upon those points in order to facilitate the student in examining them.

It seems clear that a railroad company is not liable for injuries inflicted by passing trains upon persons who are walking on the track of the company and who are therefore simply trespassers, unless of course the injury be inflicted wantonly and through gross negligence.

Pittsburgh Ft. W. and G. R. Co. v. Collins, 87 Pa. 406; Terre Haute and Md. R. R. Co. v. Graham, 46 Md. 389; Illinois Cent. R. R. Co. v. Hall, 72 Ill. 322; Ill. Cent. R. R. Co. v. Hetherington, 83 Ill. 510; McCarty v. Del. and H. C. Co., 17 Hun, 74; Kansas Pac. R. Co. v. Ward, 4 Col. 30; Rothe v. Mil. and St. P. R. Co., 21 Wisc. 256; Cogswell v. Oregon Cent. R. R. Co., 6 Oreg. 417; O'Donnel v. Mo. Pac. R. R. Co., 7 Mo. App. 190; Lang v. Holliday Creek R. R. Co., 42 Iowa 677; Van Schaeck v. Hudson River Ry. Co., 43 N. Y. 527; Richmond and D. R. R. Co. v. Anderson, 31 Gratt, 312; Houston and Texas Cent. R. R. Co. v. Smith, 53 Tex. 178.

Nor does it make any difference that the person may happen to be a child of tender years; for the railroad company cannot reasonably be expected to provide against the contingency of trespasses by them any more than against the contingency of trespasses by adults.

Phila. and Read. R. R. Co. v. Hummell, 44 Pa. St. 375; Morrissey v. Eastern R. R. Co., 126 Mass. 377; Bulger v. Albany R. R. Co., 42 N. Y. 459; Johnson v. Boston and Me. R. R. Co., 125 Mass. 75; McKenna v. N. Y. Cent. and H. R. R. Co., 8 Daly (N. Y.) 304; Frick v. St. L., K. C. and N. R. Co., 5 Mo. App. 435; Walters v. Chicago, R. I. and P. R. Co., 41 Iowa 71; Citizens St. R. W. Co. v. Carey, 56 Md. 396; Meyer v. Midland Pacific R. Co., 2 Neb. 319; Manly v. Wilmington and M. R. Co., 74 N. C. 656; Schwier v. N. Y. Cent. and H. R. Ry. Co., 15 Hun, 572.

All difficulties of this sort are, however, removed where as in the present case the child is shown to be of sufficient age and understanding to be aware of the danger of trespassing. For the court will always hold children bound to exercise discretion in proportion to their years and intelligence. If they do

not exercise such discretion they or their parents cannot recover for injuries done them.

Burke v. Broadway and Seventh Ave. R. R. Co., 49 Barb. 529; Smith v. O'Connor, 48 Pa. St. 218; Balt., etc., R. R. Co. v. Brenig, 25 Md. 378; St. Paul v. Keeby, 8 Minn. 254; Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49; Ewen v. Chicago and N. W. R. Co., 88 Wisc. 618; McMahon v. New York, 33 N. Y. 642; Ihl. v. Forty second St. and G. St. F. R. Co., 47 N. Y. 817; Reynolds v. N. Y. Cent. and Hudson Riv. R. R. Co., 58 N. Y. 248; Ostertag v. Pacific R. R. Co., 64 Mo. 421; Nagle v. Allegheny Valley R. R. Co., 88 Pa. St. 35; Haas v. Chicago and N. W. Ry. Co., 41 Wisc. 41; Pittsburgh, Ft. W. and Chic. R. R. Co. v. Bumstead, 48 Ill. 221; Donoho v. Tulcan Iron Works, 7 Mo. App. 447.

As to the propriety of granting a nonsuit in the principal case, no doubt can be entertained. This is clearly the proper cause where the plaintiff's own case discloses such a state of facts as does not entitle him to recover.

The following are among the latest cases on this point:—

Massoth v. Del. and H. O' Co., 64 N. Y. 524; Cordell v. N. Y. Cent. and H. R. R. Co., 58 N. Y. 451; Del. Lack. and W. R. R. Co. v. Toffey, 9 Vroom. 525; Bonnell v. Del. Lack. and W. R. R. Co., 10 Vroom 189; Allyn v. Boston and Alb. R. R. Co., 105 Mass. 77; Brooks v. Somerville, 106 Mass. 271; Murphy v. Chicago R. I. and P. R. Co., 45 Iowa 661; Lake Shore and M. S. R. Co. v. Miller, 25 Mich. 274; McMahon v. Northern Central Ry. Co., 39 Md. 438; Ellis v. Gt. West. R. R. Co., L. R. 9 C. P. 551; Schierhold v. North Beach and M. R. Co., 40 Cal. 447; Cohen v. Eureka Ry. Co., 14 Neb. 376; Brown v. R. R., 58 Me. 384; Trow v. R. R., 24 Vt. 487; Maretta, etc., R. R. v. Porkaley, 24 Ohio St. 48; McGuilken v. R. R. Co., 50 Cal. 7; Fleming v. R. R. Co., 49 Cal. 258.

See for some strictures upon the disposition of the Pennsylvania courts to grant nonsuits. The note to Smith v. Hestoe, Mantua and Fairmount Pass. R. R. Co., 2 AM. AND ENG. R. R. CAS. 12.

In the view of the principal case taken by the court, the negligence of the company defendant became a matter of no moment. That it was negligent in running its train at a great speed through the populous streets of a municipality cannot be doubted.

Toledo, etc., R. R. Co. v. Deacon, 68 Ill. 91; c. f. Pacific R. R. Co. v. Houts, 12 Kans. 328; Reeves v. R. R. Co., 30 Pa. St. 454 and vide e contra; Plaster v. Railway Co., 55 Iowa 449; McKonkey v. R. R. Co., 40 Iowa 205.

A municipality may, it would seem, pass ordinances regulating the rate of speed of trains through its streets.

Donnaha v. State, 8 Sm. and M. 649; R. R. Co. v. Buffalo 5 Hill (N. Y.) 209; Richmond R. R. Co. v. Richmond, 96 U. S. 521; Whitson v. Franklin, 34 Md. 392; C. B. and G. R. R. Co. v. Haggerty, 67 Ill. 118; C. R. I. and P. R. R. Co. v. Reidy, 66 Ill. 48.

And a failure on the part of the company to comply with the requirements of such an ordinance may be put in evidence to constitute portion of the proof of negligence. Dillon on Munic. Corp. § 718 note. See Jetter v. R. R., 2 Alb. R. (N. Y.) 458; Massoth v. R. R., 64 N. Y. 424; Balt. and Ohio R. R. v. State, 29 Md. 252; Rock Island, etc., R. R. Co. v. Reedy, 66 Ill. 44. See also note to Phila. and Reading R. R. Co. v. Boyer, 2 Am. and Eng. R. R. Cas. 188.

THE BALTIMORE AND POTOMAC R. R. CO.

v.

STATE OF MARYLAND, use of GEORGE W. STANSBURY.

(65 *Maryland Reports*, 648. October 29, 1880.)

What constitutes negligence is generally a question of fact, and as such is usually submitted to the jury; the Courts being reluctant, where the facts are complicated, and inferences are to be drawn, and the evidence is contradictory, to withdraw such questions from their decision.

But it being the province of the Court to determine the legal sufficiency of evidence, it sometimes becomes their duty (where the main facts are uncontroverted) to decide whether the facts offered in evidence are such as would constitute such negligence in law as would debar the plaintiff's right to recover.

Where the uncontroverted evidence proved that the deceased, (to recover damages for whose death the defendant was sued,) was improperly on the track of the defendant, that he voluntarily exposed himself to the peril, with full knowledge of the risk, and might, if he had used his eyes and ears, have seen and heard the approaching train, long before it struck him; and the only material conflict of evidence, was as to the giving of the signals upon the approach of the cars, it was *Held*:

That the deceased, having directly contributed to his own death, the plaintiff had no cause of action, and it was error to reject a prayer of the defendant to that effect.

APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

Exception.—At the trial the plaintiff offered the two following prayers:

1. If the jury find from the evidence, that on or about the 19th day of June, 1876, Albert Stansbury was killed by the locomotive and cars of the defendant, while operated by its agents on its road, and that the equitable plaintiff, to wit, George W. Stansbury, is related to him in the manner set forth in the declaration, and that the said killing resulted directly from the want of ordinary care and prudence on the part of the agents of the defendant, and not from the want of such care and prudence on the part of the deceased as ought, under all the circumstances of the case, to have been reasonably expected from one of his age and intelligence, nor from the want of ordinary care and prudence on the part of his parents, or either of them, directly contributing to the misfortune, then their verdict must be for the plaintiff.

2. Even if the jury do believe that the said Albert was guilty of

the want of such care and prudence, as ought, under all the circumstances of the case, to have been reasonably expected from one of his age and intelligence, in lying, or sitting alone, or near the railroad track of the defendant, or that his parents (or either of them) were guilty of the want of ordinary care and prudence in allowing him to attend to the cows, in the manner testified to by the witnesses; still, if they further find that the agents of the defendant did not keep a reasonable look-out, and did not give reasonable and usual signals of the train's approach, and did not exercise ordinary care and prudence in the running of the train; and that if they had kept a reasonable look-out, and had given reasonable and usual signals of the train's approach, and had exercised ordinary care and prudence in the running of the train, the killing would not have occurred, their verdict must be for the plaintiff, provided they find the other facts set out in the first prayer of the plaintiff.

And the defendant offered the six following prayers:

1. If the jury shall find that the deceased had the intelligence, experience and capacity to take care of himself, and knowledge of defendant's road, testified to by his father, and was killed under the circumstances and in the mode testified to by the witness, Mrs. Schimment, or in the mode, and under the circumstances testified to by the defendant's engineer, then there was such contributory negligence, on the part of the deceased, as will prevent, under the circumstances of this case, the recovery of the plaintiff, and the verdict of the jury must be for the defendant.

2. That there is no sufficient evidence that the injury to the deceased was caused by the negligence, or the want of ordinary care, on the part of the defendant, or its agent, and that, therefore, the verdict of the jury must be for the defendant.

3. That the rules of the defendant, offered in evidence by the plaintiff in reference to the ringing of the bell and blowing the whistle when approaching a road crossing, are designed to give notice to those using such road, and therefore the jury are not to take the same into consideration in determining whether the agents of the defendant were guilty of negligence or the want of ordinary care on the occasion of the injury to the deceased.

4. If the jury shall find from the evidence that the deceased, at the time of the injuries to him, had the intelligence, capacity for taking care of himself, experience and knowledge of defendant's railroad, as testified to by his father and the witness, Mrs. Schimment, and that on the day in question he was sitting or lying on the bank, alongside of and near to the track of the defendant's road, at a point about one hundred or one hundred and fifty feet from the crossing of the Sulphur Spring Road, and on the engineer's side of the track, and that the engineer was using ordinary care in keeping a look-out ahead as he was approaching the said point, and was the first person in charge of the train to see the deceased, and

that when so seen he was in a position in which he would not have been struck, and that as soon as the said engineer discovered the position of the deceased, he at once, and as soon as it was possible to do so, did all he could to stop the train by applying the air-brake and reversing his engine, and also as soon as possible, sounded his alarm whistle, and that, notwithstanding such efforts, the deceased was struck by the pilot of the engine, then the plaintiff is not entitled to recover, although the jury shall find from the evidence that no bell was rung nor whistle sounded as a signal of approach to the said road crossing.

5. If the jury shall find from the evidence the facts set forth in the defendant's fourth prayer, and that when the engineer of the defendant's train first discovered the deceased and his companion they were lying alongside of the track, and in a position in which they were clear of the engine and cars, and that when he so first discovered them he thought they were asleep, and shall also find that when he so first discovered them they were objects lying on the bank alongside of the track, he could have stopped the train before reaching them, yet the plaintiff is not entitled to recover; provided the jury shall find that as soon as the said engineer discovered that said objects were boys, he did all he could by the application of his air-brake and the reversal of his engine, and giving alarm whistle to avoid striking said boys; and provided they shall also find the said deceased had the intelligence, experience, capacity to take care of himself, and knowledge of defendant's railroad, testified to by his father, and had been sent by his mother to keep his father's cows from the railroad, and was, as said train was approaching, sitting or lying alongside of said track, and so close to it as to be struck by the passing engine, or got up from the position in which he had been sitting or lying, clear of the track, and went against the engine as it was passing, and was struck.

6. If, under the instructions of the court, the jury should find a verdict for the plaintiff, then, in assessing the damages, they are not to take into consideration the mental pain and suffering of the said George W. Stansbury, in consequence of the death of the said Albert, and are not to give against the defendant vindictive damages, but are to give to the plaintiff for the use of the said George W. Stansbury, such sum of money as they may believe, from all the evidence in the cause, will be an adequate compensation to him for the loss of his said son's services from the time of his death, to the period when, if he had lived, he would have attained the age of twenty-one years.

The court, (GRASON and YELLOTT, J.) granted the plaintiff's prayers, as also the defendant's, except its first and second, which were rejected. The defendant excepted, and prosecuted this appeal, the verdict and judgment having been for the plaintiff.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

Bernard Carter, for the appellant.

James A. L. McClure, for the appellee.

BOWIE, J. delivered the opinion of the court.

The cause of action in this case is the death of the appellee's son by collision with the cars of the appellant. The appellee offered evidence tending to prove that his son, a lad about twelve years of age, on the 19th of June, 1876, whilst sitting or lying down with a companion, on the edge of the embankment of the appellant's railroad, "just at the end of the cross-ties," watching the cows of his father, was struck by the engine of a train of the appellant, without warning and killed; that no notice was given of the approach of the train by blowing the whistle; that the railroad passes through the land of the appellee, who was engaged in the milk business, and the boy who was killed drove his wagon, and when at home watched the cows grazing in the meadow of his father adjoining the railroad, to keep them off of it, and was so engaged when the accident occurred.

It was further proved, that the railroad track at the place of the accident and for the distance of half a mile, was perfectly straight, open and unobstructed in view; that the grade was upward, the hour about 3 P. M.; the boy was intelligent, and capable of managing a horse and wagon.

On the part of the appellant, evidence was offered tending to prove that the train was an express, running at the rate of thirty-five miles per hour; that the engineer was on the look-out, that he blew the whistle at the signal post as they approached the Sulphur Spring Station (near which the accident occurred) and did not see the children until it was too late to stop the train; when he saw them, the one killed was on his hands and knees moving towards the track.

From this synopsis it is apparent the liability of the appellant depends upon the question whether the injury was caused by the want of due care upon the part of the appellant or by the negligence of the son of the appellee?

The prayers submitted on the part of the appellee maintained substantially the following propositions:

1st. If the death of the boy resulted directly from the want of ordinary care and prudence on the part of the defendant's agents, and not from the want of care and prudence on the part of the deceased, directly or indirectly, contributing to the misfortune, then the verdict must be for the plaintiff.

2ndly. If the deceased was guilty of the want of such care as ought under all the circumstances of the case to have been expected

of him, still, if the agents of the defendant did not keep a reasonable look-out, and did not give the usual and reasonable signals of the train's approach, and did not exercise ordinary care in the running of the train, by the use of which the accident would not have occurred or might have been avoided, the verdict must be for the plaintiff.

The appellant's prayers virtually affirmed,

1st. That there was such contributory negligence on the part of the deceased as deprived the appellee of all right of recovery.

2nd. That there was no legally sufficient evidence to be submitted to the jury that the injury was caused by the negligence or want of ordinary care of the defendant's agents.

The effect of these prayers, if granted, would have been to withdraw the case from the consideration of the jury, and to decide it by the court, as upon a demurrer to evidence.

The refusal of the prayers of the defendant, and the granting of those of the plaintiff, is the ground of this appeal.

There are two classes of cases of negligence, in one of which the question is submitted to the jury, and in the other, it is decided by the court.

It is difficult in many cases to determine to which tribunal the question of negligence belongs, so close is the resemblance in many of their features and so minute the difference of circumstances; yet the distinction is well established, and the most recent decisions of this court, sustained by the authority of other tribunals, English and American, seem to include the present, as a question of law.

What constitutes negligence is generally a question of fact, and as such is usually submitted to the jury; the Courts being reluctant where the facts are complicated and inferences to be drawn and the evidence contradictory to withdraw such questions from their decision. *Price's Case*, 29 Md. 420; *Fryer's Case*, 30 Md. 47; *Trainor's Case*, 33 Md. 542; *Mulligan's Case*, 45 Md. 486.

But it being the province of the Court to determine the legal sufficiency of evidence, it sometimes becomes their duty (where the main facts are uncontroverted) to decide whether the facts offered in evidence are such as would constitute such negligence in law as would debar the plaintiff's right to recover. *Wilkinson's Case*, 30 Md. 224; *Andrew's Case*, 39 Md. 329. In *Fitzpatrick's Case*, 35 Md. 32, it was said by this Court that many cases could be suggested where the question of negligence (of a railroad company sued for damages for injuries sustained by its alleged negligence) could properly be one of law for the Court, though they are not of frequent occurrence; such cases always present some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ.

Again, in 38 Md. 588, it was held that legal insufficiency of evidence to prove negligence "is a question of law of which the

Court is the exclusive judge; and cases do occur where the proof of negligence is so slight and inconclusive in its nature as to demand from the court an instruction as to its legal insufficiency to prove negligence in order to prevent the jury from indulging in wild speculation or irrational conjecture." *Lewis' Case*, 38 Md. 588; *Andrew's Case*, 39 Md. 329.

The supreme Court of Massachusetts in the case of *Butterfield v. Western Railroad Corporation*, 10 Allen 532, commenting on the facts of that case, and the province or duty of the Court in such cases remarks:

"By due care is meant reasonable care adapted to the circumstances of the case. The crossing of a place known to be dangerous, as a railroad track frequently is, by reason of the passing trains, reasonably requires a high degree of watchfulness and attention. Before attempting to cross, a man should make a reasonable use of his sense of sight as well as of hearing in order to ascertain whether he will expose himself to a collision. If he fails to use his senses without reasonable excuse, he fails to use reasonable care," and in support of this position, refers to *Shaw v. Boston & Worcester R. R.*, 8 Gray, 73; *Warren v. Fichburg R. R.*, 8 Allen, 227; *Commonwealth v. Fichburg R. R.*, *Ibid.* 189; *Stevens v. Oswego R. R.*, 18 N. Y. 422.

Referring to the submission of the evidence to the jury, the Court declares, that "in *Toomey v. The London, etc., R. R.*, 3 C. B., (N. S.) 146, it was said, that a mere scintilla of evidence, is not sufficient to authorize a Judge to submit the question of the defendant's negligence to a jury; but there must be evidence upon which a jury may reasonably and properly infer that there was negligence on his part." In the latest case upon this subject, this Court held "it was incumbent on the plaintiff to prove that the injury was caused entirely by the negligence or default of the defendant's agents, and it must not appear from the evidence that want of ordinary care and prudence on the part of the deceased directly contributed to the cause of death," citing *Foy's Case*, 47 Md. 76; *Lewis' Case*, 38 Md. 599; *Northern Central R. R. Co. v. State, use of Burns*, ante 113. The uncontroverted evidence in this case proves that the deceased was improperly on the track of the defendant, that he voluntarily exposed himself to the peril, with full knowledge of the risk, and might, if he had used his ears and eyes, have heard and seen the approaching train, long before it struck him; thus directly contributing to his own death.

The only material conflict of evidence in the present instance is as to the giving of the signals upon the approach of the cars, as to which the language of the Supreme Court, in the case of *Houston*, 95 U. S. 701, is very pertinent and conclusive.

Mr. Justice FIELD, delivering the opinion of the Court, says: "If the positions most advantageous for the plaintiff be assumed

as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the 'negligence, unskillfulness, or criminal intent' of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on the private right of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety."

"Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming."

The language above quoted is adopted and incorporated by this Court in its opinion in Burns' Case, above cited. Much as we lament the melancholy event which deprived the father of an intelligent, industrious, and estimable son, we are compelled by the current of authorities to decide that the deceased, having directly contributed to his own death, the appellee has no cause of action, and the Court below, having rejected the appellant's prayer to that effect, the judgment below must be reversed.

Judgment reversed.

BELL

v.

THE HANNIBAL AND ST. JOSEPH R. Co., Appellant.

(72 Missouri Reports, 50. April Term, 1890.)

When the petition charges negligence as the plaintiff's ground of action, and there is no question of unskillfulness on the part of the defendant raised either by the petition or the plaintiff's evidence, the plaintiff is not entitled to an instruction as to the effect of unskillfulness on the part of defendant.

Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court; where they are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts.

The requirement of section 806, Revised Statutes, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the cross-

ing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway.

The statute does not require that these warnings shall be continued until the train has passed the crossing, but only until the engine has passed.

An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business.

In this instance the engineer applied the air brakes to the train, but did not attempt to reverse the engine.

The mere fact that a train was moving at a dangerous rate of speed, will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence.

APPEAL from Linn Circuit Court.—HON. G. D. BURGESS, Judge.
Reversed.

Geo. W. Easley for appellant.

Louis Houck for respondent.

NAPTON, J.—This was a suit to recover damages under the 2nd section of the damage act, based on the allegation that the plaintiff's son, Athen Bell, was killed by the negligence of the defendant's agents, in running a train through the town of Meadville, at an improper rate of speed and without giving timely notice of its approach.

It seems that Athen Bell, who was past fifteen years old, and well grown for his age, had, at the request of his father, who had recently moved from Saline county into that neighborhood, gone to Meadville to procure some corn, and that about two o'clock in the afternoon, when the fast passenger train of defendant from the east was due, he stood upon the main track between the rails looking at an engine attached to a freight train which was on the switch south of the main road, waiting for the fast train to pass, which did not stop at Meadville. His attention seems to have been absorbed by this locomotive. At all events he seems not to have heard the station signals which were given at the usual place east of town, and about a half mile from the depot; nor did he pay any attention to the alarm whistle which the engineer had sounded, as soon as he saw the boy on the track. The boy was west of the street or road which crossed the railroad, from forty to sixty feet. How far the boy was from the train, when the engineer discovered him on the track, is not certainly fixed by the testimony, not less however than 200 yards. The train could have been seen for six or seven hundred feet. The alarm whistle was kept continuously blowing and also the bell was rung, according to some witnesses.

When the engineer discovered that the boy did not move, he put on the brakes, but it seems that it was too late to save the life of young Bell.

The following were the instructions in the case given at the instance of the plaintiffs:

1. It stands admitted by the pleadings in this cause that on the 11th day of May, 1875, on the track or line of the Hannibal and St. Joseph Railroad, in the town of Meadville, in Linn county, Athen Bell, the son of the plaintiffs, was struck and killed by a locomotive engine attached to a train of cars, run and operated on defendant's said railroad by its agents, servants and employes.

2. If the jury believe from the evidence that the plaintiffs, John A. Bell and Eliza J. Bell, are husband and wife, and the parents of Athen Bell, who was killed on defendant's railroad at the time and place stated in the petition, and that said Athen Bell was, when so killed, a minor and unmarried, then the jury should find their verdict for the plaintiffs; provided they further believe from the evidence that said Athen Bell died from an injury resulting from or occasioned by the negligence or unskillfulness of any agent or employé of the defendant whilst running, conducting or managing the locomotive engine and train which ran upon, struck and killed said Athen Bell.

3. It is the duty of those in charge of a locomotive and train of cars in approaching the crossings of the public streets to commence ringing the bell or sounding the steam whistle at the distance of eighty rods therefrom, and to keep ringing the bell continuously or sounding the steam whistle at intervals until the train shall have passed over such public street, and if the jury believe from the evidence that, in this case, as the train approached and passed over a public street in the town of Meadville, the person in charge thereof did not ring the bell or blow the whistle as above required, and that the boy, Athen Bell, was struck by the locomotive and killed by reason of said omission and without fault on his part, then the jury will find their verdict for the plaintiffs.

4. Railroad companies and those operating and running their trains should exercise greater care and caution at points where their road passes through populous towns and villages than would be necessary in districts not so thickly populated.

5. Railroad companies, owing to the dangerous character of the vehicles and machinery which they operate, are held to the greatest care, caution and skill in the management of their business.

6. Notwithstanding the jury may believe from the evidence that the said Athen Bell was improperly on the track of defendant's railroad, and that it was negligence on his part to have been there at that time; yet if the jury further find from the evidence that the servants and employes in charge of the engine and train mentioned in the petition were negligent in running and managing the

same, and that such negligence and improper management of said engine and train were the direct and immediate cause of the death of said Athen Bell, then the jury are bound to find for the plaintiffs.

7. Although the jury may believe from the evidence that the boy was improperly on the track, and that he may have been negligent in standing thereon; yet if the jury believe that those in charge of the train could, by the proper observance of their duties and by ordinary care, prudence and caution in their business, have slackened up the speed of the train, by any means in their power, so as to prevent his killing, and that they failed so to do, then the persons in charge of the train were guilty of negligence for which the defendant is responsible.

8. While railroad companies are not limited by law as to rate of speed, yet whether the rate of speed in any particular case is excessive or dangerous, is a question for the jury, to be determined by them in view of the time, place and circumstances, and if in this case the jury believe that the rate of speed at which the train was approaching the town of Meadville, and at the time the boy was struck, was excessive or dangerous at that time and place, then those in charge of it were guilty of negligence in so running it.

9. In making up their minds whether the rate of speed at which the train was running at the time the boy was struck and killed was dangerous, the jury may take into consideration the time, place and all the surrounding facts and circumstances detailed in evidence.

The defendant then prayed the court to give the following instructions to the jury:

1. The burden of proof is on the plaintiffs to show every material fact going to make up the issues, and unless they have proven by a preponderance of evidence to the satisfaction of the jury that young Bell was killed by the carelessness and negligence of defendant, and without his contributing proximately thereto, they must find for defendant.

2. If the jury believe that deceased was killed by reason of his own negligence and not by the negligence of defendant, then they must find for the defendant, although they may believe that at the time the train struck him it was running at the rate of twenty-five miles per hour or faster.

3. Although the jury may believe that in some regards the defendant was negligent, yet if they further believe from the evidence that deceased, by the exercise of ordinary prudence and caution, could have avoided the accident, they must find for the defendant.

4. If the jury believe from the evidence that there is a curve in defendant's road just east of the depot at Meadville which prevented the engineer of the engine drawing the train in question

from seeing Athen Bell upon the main track of said road between the crossing and said depot until such engineer was within 200 or 300 yards of said depot; that, owing to the grade on said road between said points, said engineer could not stop said engine and train after seeing said Athen Bell, so as to prevent striking and killing him; that said engineer sounded the alarm whistle on said engine as soon as he discovered said Bell to be upon said track, and kept sounding it so long as there was any chance of warning said Bell of the approach of said engine and train, they will find for the defendant, notwithstanding they may further believe from the evidence that said train was running at a speed of twenty-five miles an hour or faster.

5. If the jury believe from the evidence that the engineer of the engine drawing the train in question could not see Athen Bell, the deceased, until within from 200 to 300 yards of him, and that owing to the grade he could not stop his train after so seeing said Bell, so as to prevent striking and killing him, they will find for the defendant, provided they shall further believe from the evidence that said engineer sounded the alarm whistle as soon as he discovered said Bell to be upon the main track of defendant's road and kept sounding it so long as there was any chance of warning said Bell of the approach of said engine and train.

7. Although the jury may believe that the train which struck young Bell was running at the rate of twenty-five miles per hour or more, and that he was struck near the Meadville depot, and that the bell was not ringing, yet that will not excuse him from carelessly and negligently standing on defendant's track at a time when a fast train was due, and if the jury believe his death resulted immediately from his imprudence in so standing on said track, and the accident could not have been avoided by defendant with proper care and prudence, the plaintiffs cannot recover.

7. If the jury believe from the evidence that Athen Bell, the deceased, was a person of sufficient size to be apparently capable of taking care of himself, the engineer of the engine which struck him had a right to presume that, upon due warning being given to said Athen Bell, he would leave the track and get out of the way of said engine.

8. If the jury believe from the evidence that defendant's train could have been seen by young Bell at the time of the accident a distance of 200 steps or more from the spot where he was struck by the engine, or that he could have heard it that or a greater distance had he exercised his senses of sight and hearing, notwithstanding which facts he remained on defendant's track and was struck and killed by the engine, such action on his part was negligence, and if the jury believe his death was caused proximately by such negligence, the plaintiffs cannot recover.

9. It is negligence and carelessness for a person to stand on the

track of a railroad without keeping watch both ways for trains. And if the jury believe from the evidence that Athen Bell was standing on the defendant's track at the time the defendant's fast train was due, and that the agents of defendant in charge of said train exercised ordinary care and prudence in the management of said train, and did all they could to stop the train and avoid the accident at the time said Bell was struck, then they must find for defendant.

10. Although the jury may believe from the evidence that the defendant was negligent in running and operating its train which struck and killed Athen Bell, still the plaintiffs cannot recover unless the jury believe from the evidence that such negligence of defendant was greater than that of said Bell in standing on defendant's track at the approach of said train.

11. Although the jury may believe from the evidence that the engineer of the train that struck Athen Bell did not reverse his engine, yet he had a right to presume that said Bell would get off the track on the approach of the engine, and if he, said engineer, acted upon his judgment and did what he judged was most likely to save the boy in applying the air-brakes and sounding the danger signals, then his omission to reverse his engine was not negligence.

The court gave those numbered one, two, three, four, five, six, seven, eight, nine and ten, and refused to give that numbered eleven. To the refusal of the court to give that numbered eleven, the defendant at the time excepted.

The objections taken here to the second instruction, given for plaintiffs, we do not consider as tenable, except that the word "unskillfulness" should have been omitted, as there was no charge of of that in the petition, and indeed no evidence touching the subject, on the side of the plaintiffs.

The principal objection is, that the instruction leaves the whole subject of negligence to the jury. According to the prevalent practice here, the court that presides at the trial of a case gives instructions prepared by the attorneys on each side, which are usually drawn up in the shape of independent, separate propositions, and to ascertain the propriety of any single one, it must be considered in connection with the other instructions on each side. Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court. Where the facts are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts. Mr. Wharton in his work on negligence observes: "The true position is this: Negligence (with the exception hereafter to be noted) is always a logical inference, to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of negligence would be set aside by the

court, then it is the duty of the court to instruct the jury to negative negligence. In all other cases, the question is for the jury, subject to such advice as may be given by the court as to the force of the inferences. The only exception to this rule is that elsewhere discussed, where a statute declares that a party doing or omitting certain things is to be treated as negligent. In such cases all that the jury has to decide is whether the thing in question was done or omitted. If so, negligence is juridically imputed, and this must be declared by the court." Vol. 1, § 420. We see no substantial objection to the second instruction, when considered in connection with the other instructions given on each side.

The third instruction is also objected to on the ground that it had nothing to do with the case. We concur in this view, although its impropriety alone would scarcely justify a reversal. The statute which requires the bell to be rung or the whistle sounded was for the benefit of persons at the road crossing or approaching it; but the boy killed in this case was not on the road, or at the crossing, but forty or sixty feet west of it. Besides the instruction mistakes the requirements of the act in declaring that the bell shall be rung or the whistle sounded until the train shall have passed over such street or road, whereas these warnings are only required to be continued until the locomotive passes, not the entire train. However, this instruction was harmless, and had really nothing to do with the case.

It may be observed in advance of an examination of the real point and only point involved in this case, that young Bell was guilty of the grossest negligence, beyond all dispute, a negligence difficult to be accounted for, assuming him to have been a young man of ordinary intelligence and without any defect of sight or hearing, and there was no proof that he was not. His father had recently moved into the neighborhood of Meadville; and he had never lived near to any railroad before, and the boy was, therefore, naturally not familiar with their detailed operations. Still he must have known, without any such familiarity, of the danger of standing on a railroad track and of the necessity of watching for the approach of a train. He must have known that a person in such a position, to be safe, must use his eyes and ears. His attention was absorbed by a locomotive of a freight train on the switch south of the main track. My conjecture is, that he believed that he was on a switch himself and that the main track was the one where he saw this train standing preparing to move. He must have heard the alarm whistle which was sounded repeatedly, at first at a distance of 600 feet, but as I conjecture, thought the approaching train was on the same track with the train before him. It is true he did not hear the man who hallooed to him to get off the track, to look out for the train, because the wind was blowing rather strong from the west or northwest, but the sharp whistle used to

alarm cattle would be far more distinct and powerful than a human voice, and could scarcely have been unheard. He had time after the whistle was sounded to get off the track—he was near the south rail—and two steps would have placed him out of the reach of the cars.

Notwithstanding his negligence, the employes of the railroad company had no right to run over him, and the decisive question in the case was whether, after discovering the position of young Bell and that he had not moved at the sound of the alarm whistle, the engineer did everything in his power to avoid a collision. This question is presented by the seventh instruction given for plaintiffs, and was also the point upon which the eleventh asked by defendant was refused. The seventh instruction was right, if the words "by any means in his power" had been qualified by adding: "consistent with the safety of the train." The eleventh instruction asked by the defendant presents in plain terms the real point of the case. The evidence shows that everything was done by the engineer, when he ascertained that Athen Bell did not move at the alarm whistle, except to reverse the engine, and the question is, whether the engineer in simply applying the air-brakes, and not reversing the engine, is to be regarded as justified by the circumstances upon the ground that he acted on his judgment, which, whether right or wrong, had to be formed instantaneously. Upon this subject the engineer testified: "It would help to stop the engine to reverse the engine. I saw the boy, but did not reverse the engine." "There is danger of blowing off the cylinder head in reversing an engine. In cases of this kind I don't reverse the engine, according to my judgment. I whistled to save the boy. I could not whistle and reverse the engine at the same time; did not reverse the engine, so I kept on whistling; would have to quit whistling to reverse the engine; you have to use both hands in reversing an engine. The cab of an engine is six or seven feet wide; the bell cord is on the left hand side; it would not take very long to reverse an engine; it would take more than a second; the whistle lever is four or five feet from me; it is in the right hand corner; could not have reversed the engine with one hand; if you did not get the lever clear over, it would make it worse; could have quit whistling and reversed and gone to whistling again; don't think we would have slackened up much, if any more, by reversing." If this engineer was a competent one, and the proof was that he was one of the best in the employment of defendant, and had been in the business ten years, and there was no contradictory testimony, then it is clear that his judgment of what is best to be done, must necessarily govern his action. This judgment had to be formed instantaneously, there was no time for deliberation, and, whether right or wrong, his action in accordance with it cannot be held negligence. The eleventh instruction asked by defendant should,

we think, have been given, assuming, as in this case we are authorized to do, that he was a competent and careful engineer.

It is urged that this train was running at a dangerous rate of speed, through the town of Meadville, and that this of itself was negligence. The schedule time was twenty-five miles an hour, and Meadville was not a stopping point. That fact was known, doubtless, to every person in the village, and that it was four or five minutes behind time on the occasion of this unfortunate accident. There were various estimates of the speed of the train made by bystanders, and passengers, which of course, were of very little value. The engineer, however, admits that the train was running when it reached the outskirts of Meadville, at the rate of twenty-five or thirty miles an hour. The law has not fixed the rate of speed allowable, and conceding the speed in this case to have been unjustifiable, and that injury to persons and property under such circumstances would make the company responsible, yet it could only be when such persons were guilty of no negligence themselves, or such property was not negligently in the way. Had the plaintiffs' son been a boy of such tender years as to be incapable of taking care of himself, the question of the liability of the defendant on the sole ground of improper speed would have been properly presented, but nothing of this kind appears. The boy was in size and appearance a man, and he was taking a wagon to Meadville to procure a load of grain, and beyond all doubt his position on the track at the very time when the train was due, and when the spectators had gathered about the depot to witness the operation of the mail catcher, a recent invention by which a mail bag was transferred to a train in motion, was unaccountable negligence. It would seem natural that the boy, seeing the crowd of spectators not far east of him, should have made some inquiry as to the cause. That the train was due and did not stop, and was accustomed to a rate of speed between twenty and thirty miles an hour, if not known to him already, could have been readily ascertained. The managers of the train, however, could not be affected by such negligence or ignorance. The engineer had a right to assume, when the boy came in sight, that he would step off upon the sounding of the alarm whistle, and the only question in the case was, whether, upon seeing the boy's position on the track, and that he persisted in staying there after repeated and continuous alarms of the whistle, the engineer did use all the appliances in his power to prevent a collision, according to his best judgment.

Judgment reversed and cause remanded. All concur.

SHERMAN

v.

THE HANNIBAL AND ST. JOSEPH R. R. Co., Appellant.

(72 *Missouri Reports* 62. April Term, 1880.)

The answer denying the plaintiff's right to sue as guardian, and no evidence having been offered of her appointment as such, so far as the record shows, the judgment in her favor is, for that reason, reversed.

It seems that a person riding on a freight train on which passengers are allowed to be carried, is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain.

It is well settled that to make the master liable for the tortious act of his servant, the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Upon this principle, where the conductor had exclusive control of a railroad train and of all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured; *Held*, that the railroad company was not liable.

The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants.

If a passenger on a freight train is injured while simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an unauthorized service for the company.

APPEAL from Livingston Circuit Court.—Hon. E. J. Broadus, Judge.

Reversed.

Geo. W. Easley for appellant.

S. Turner for respondent.

HOUGH, J.—The petition in this case alleged the minority of the plaintiff and the appointment by the probate court of Livingston county of Ellen Sherman as his guardian. The appointment of the guardian is specifically denied in the answer and the record fails to show that any evidence was offered on that subject. Following the decision of this court in the case of *Porter v. The Hannibal and St. Joseph R. R. Co.*, 60 Mo. 160, the judgment must, for this cause, be reversed.

As the case must be retried, it will be proper to make some observations upon the law of the case as presented by the record now before us. The evidence taken at the trial is preserved in the bill of exceptions in the following form: The plaintiff introduced evidence tending to prove that the plaintiff got on a freight train

of defendant at Chillicothe, about October 6th, 1875, without the knowledge or consent of his parents; that he rode on said car some ten miles when he was discovered, being still in Livingston county, by a brakeman on said train, when he was told by the brakeman if he wanted to ride he must help brake, and placed him at a brake and instructed him in the signals when to brake and signal the engineer; and when he got to Cameron he was told if he wanted to ride to St. Joe he must help coal up; that the said brakeman permitted him to ride on said train, and not in the caboose car attached to the train for the purpose of carrying passengers, till the train arrived at Cameron, a point forty miles west of Chillicothe; that at Cameron the plaintiff, who was thirteen years and ten months old, and a bright, capable boy of his age, was directed by said brakeman to assist in coaling up the engine, which he did; that when it was coaled up, the brakeman told the boy to get on top of a certain freight car if he wanted to ride to St. Joseph, which he did; and while riding on top of said train, and about one mile from St. Joseph, and in Buchanan county, the brakeman, by signs, directed the plaintiff to adjust some boards on a car, which boards were falling off; that while plaintiff was in the act of so adjusting said boards, one of them striking on and against a post hit and threw plaintiff off the train, which was then in rapid motion, and broke his leg, seriously injuring him for life; that the conductor of said train knew plaintiff was on the train at Cameron and afterward to the time of the accident, but never spoke to him or gave him any directions in any way.

Defendant offered evidence tending to show that the conductor had exclusive control of the train and all persons on it; that plaintiff never paid any fare; that he secreted himself when he got on the train; that no employé of defendant had any authority from defendant to carry passengers unless they paid their fare, and never to permit any person to ride on any part of their train except in the caboose attached to the train for the purpose of carrying passengers; that this train had a caboose attached; that all conductors and brakemen had been instructed never to carry any person without he paid his fare, and never to carry any person on a train other than in the caboose; that the brakeman had exclusive control of coaling up at Cameron.

It may be conceded that the plaintiff is to be regarded as a passenger at the time he was injured. The train being one on which passengers were allowed to be carried, although the plaintiff boarded the train without the permission or knowledge of the conductor, yet as the conductor, after he became aware of his presence on the train, suffered him to remain, he was entitled to the same protection as if he had paid his fare. *Wilton v. Middlesex R. R.*, 107 Mass. 108.

. It is plain, however, from the testimony, which we have in-

serted at length, that the plaintiff was not injured simply by reason of his being carried as a passenger in a dangerous position, in violation of the rules of the company, but in consequence of the order of the brakeman to him to adjust some loose boards on one of the cars in the train, in the execution of which order he was thrown from the train and injured. This order of the brakeman was clearly the proximate cause of the injury. But for this order and the attempted execution of it, it does not appear that the plaintiff would have been injured, as the train seems to have gone through in safety. Whether the company is responsible for the consequence of the brakeman's request to the plaintiff to adjust the loose boards is the sole question to be determined.

It is well settled that to make the master liable for the tortious act of his servant, the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Here the testimony shows that the brakeman had no control whatever over any person on the train and no concern with them. The testimony is "that the conductor had exclusive control of the train and of all persons on it." The control assumed by the brakeman over the plaintiff, and his directions to him to render various services on the train, and especially the service in which he was injured, were wholly unwarranted and unauthorized, and the master cannot be held liable for the consequences of such acts. When an act done by a servant is within the scope of his employment, the master will be liable, although the servant does not obey his orders as to the manner of its performance. But it was no part of the duty of the brakeman, so far as this record shows, to employ or to direct any person, much less a passenger, to perform any service on the train, and if without such authority he negligently led the plaintiff into danger, such negligence is his own and cannot be imputed to the master. Nor does it appear that the conductor was aware of the misconduct of the brakeman in this particular.

The youth of the plaintiff, as was said by Agnew J., in *Flower v. Railroad Co.*, 69 Pa. St. 216, (8 Am. Rep. 251), "may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or confer authority on one who has none." *Snyder v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 413; *Towanda Coal Co. v. Heenan*, 86 Pa. St. 418.

If by reason of an accident to the train the plaintiff had been injured while simply riding on a freight car, the defendant would, on the record before us, be held liable, as it does not appear that the regulations of the company prohibiting passengers from riding elsewhere than in the caboose, were conspicuously posted as required by law. The statute on this subject is as follows: "In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time,

in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided said company, at the time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers. R. S., § 800; *Higgins v. Hannibal and St. Joseph R. R. Co.*, 36 Mo. 418. If the rules were properly posted, the mere acquiescence of the conductor in the plaintiff's remaining on one of the freight cars after he discovered plaintiff was on the train, would not render the company liable, unless, perhaps, the plaintiff could not read, and the conductor was aware of that fact, and had reason to believe that he was ignorant of the rules of the company. The judgment will be reversed and the cause remanded. All concur.

See *Klein v. Central Pacific R. R. Co.* 37 Cal. 400, *Lovett v. Salem, etc., R. R. Co.*, 9 Allen, 557. *Duff v. Allegheny Valley R. R. Co.* 2 Am. & Eng. R. R. Cas. 1. *Cauley v. Pittsburgh, etc., R. R. Co.* 2 Am. & Eng. R. R. Cas. 4. S. C. infra. *Everhardt v. Terre Haute, etc., R. R. Co.*, infra.

DRAKE

v.

KIELY.

(98 *Pennsylvania State Reports*, 492. May 5, 1879.)

A lad about ten years of age was forcibly put on board of a freight train by its brakeman, and against his will was carried for a distance of five miles. He returned home on foot, running most of the way, and was taken sick and became permanently crippled in both legs. *Held*, that the action of the brakeman was a trespass, and if the conductor of the train was present, and directed or consented to the acts of the brakeman they were joint trespassers, and if the sickness resulted directly from their acts they were liable in an action of trespass.

PER STERRETT, J.—In view of the testimony in this case the court could not undertake to decide that the trespass had no connection with the plaintiff's sickness; that the latter was not the natural and probable consequence of the former. Nor that it was not such a consequence as under the circumstances might and ought to have been foreseen by the defendants as likely to flow from their conduct. These were necessarily questions for the jury.

MARCH 10th, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKY and STERRETT, JJ.

Error to the Court of Common Pleas of Bradford county: of January Term 1877, No. 55.

Trespass on the case by Patrick H. Kiely, by his next friend, John Kiely, against James H. Drake and George Drake, for an injury alleged to have been suffered by the plaintiff by reason of the unlawful acts of the defendants.

James H. Drake, one of the defendants, was the conductor of a freight train, with a caboose car attached for passengers, on the

Northern Central Railway, on the 24th of August, 1872, at the time of the alleged cause of action, and had acted in that capacity for the period of twenty-two years; the other defendant, George Drake, was a son of J. H. Drake, and acted as brakeman at the time of the alleged cause of action, and was at that time about eighteen years of age. The plaintiff, when injured, was about ten years of age, and resided in his father's family near the depot. The train, on the 24th day of August, arrived at the depot, in Troy, a little after 4 o'clock P. M., and was about two hours late. The conductor immediately went to transact the necessary business into the office of the agent, whose office was located on the west side of the depot building, the railway track being on the east side. The brakemen were engaged in the transfer of freight at one of the freight cars standing near the north end of the depot platform; the work at the station was completed, with the exception of loading a piano or melodeon. Henry Hebe, one of the employes of the train, went to the caboose, which stood near the water-tank, at the south end of the depot, to get an iron bar, and saw the plaintiff, with two or three of his brothers and some other boys, in the caboose taking peaches from a crate, which they had broken. He immediately stepped back and informed George Drake of the fact. As George came up, the plaintiff came from the car, and had stepped on to the depot platform, when George took him in his arms, carried him into the caboose and put him in the closet on the east side, locked the door, and immediately went back and assisted to load the instrument, which was done in three or four minutes. About the time the work was completed, James H. Drake came from the office, and the train immediately started. He alleged he knew nothing of what had happened between his son and the plaintiff, and had no knowledge that the plaintiff was in the car or the closet until the train was in full motion, running at about the rate of fifteen miles an hour on a down grade, and was near the plaster-switch, a distance of between a quarter and a half mile from the depot. It was then concluded, upon consultation of the defendants, in plaintiff's presence, that they would take him on to Columbia Cross Roads, a distance of some five miles, when he could return with Joseph Williams on the express train coming south, which would bring him back to Troy, his home, in the early part of the evening. He was taken to the Columbia Cross Roads, got out of the caboose, went home on foot, running or trotting most of the way, as he alleged. He arrived at his home between 5 and 6 o'clock, went to his father's house, and the same evening his mother sent him down town. He was seen coming towards town the same evening, and on the Monday following he was seen around the depot. He was taken sick after his return from the Cross Roads, and remained, it was alleged, in an unconscious state for a long time. No doctor was called until some ten or eleven days after his return

from the + Roads. From this sickness he never recovered. He is a cripple in both legs, and will remain so, in all probability, for life. He brought suit against defendants for damages alleged to have resulted from the sickness caused by his trip to the Cross Roads.

At the trial, before Morrow, P. J., defendants proposed to ask the witness, Dr. Axtell, on cross-examination, "If at this first visit Mrs. Kiely stated in the presence of the plaintiff that his (plaintiff's) sickness was caused by his having been in swimming?" Objected to as not a cross-examination. Objection sustained, question rejected. (First assignment of error.)

Also to ask witness, Cornelius Sayles, whether, in conversation, Kiely told him how the boy (plaintiff) got hurt, whether he did not say he got hurt playing weak horse. Objected to, because, first, any conversation had with John Kiely will not affect the plaintiff; and, second, defendants were bound by John Kiely's answers when interrogated in relation to the alleged conversation. Objection sustained. (Second assignment.)

The second and fourth points of the plaintiff, which the court affirmed, were as follows:

2. That if J. H. Drake aided, abetted or directed George Drake in taking the plaintiff on board the car, or if the act of George Drake was in the presence of J. H. Drake, he being the conductor in charge and control of the train, and George Drake a brakeman under him, then the act was the act of J. H. Drake, and the plaintiff is entitled to recover. (Seventh assignment.)

4. That the plaintiff, being a child of tender years, a different rule of responsibility and contributory negligence prevails from that as to adults, and that what might be a bar to the recovery of consequential damages by an adult might not be a bar in the case of a child of tender years. (8th assignment.)

In the general charge, the court, *inter alia*, said:

"The undisputed evidence shows that the plaintiff was forcibly put on board the car and carried against his will to Columbia Cross Roads, a distance of nearly five miles; also, that he returned home on foot, running a part if not all the way. George Drake testifies that he put him on the car and locked him in the closet, and kept him there until after the train was under motion. This was an act of trespass on his part, [and if James H. Drake was present, directing or consenting to the act of George in putting him on the car, they were joint trespassers, and the plaintiff is entitled to recover against both] such damages as the jury find under the evidence, he sustained at their hands. If his sickness was the direct result of their acts, that is, if their acts, in connection with the plaintiff's fright, excitement and exertion in returning home, were the immediate cause of his sickness, [he is entitled to recover damages,

as well from the injuries resulting from his sickness as by being put on the car and carried away.]

"But he cannot recover for injuries resulting from his sickness, if his own conduct and acts constituted negligence on his part, which contributed in any degree to such sickness. [What would be negligence in an adult might not be negligence in a boy ten years of age, and hence, the jury in passing on the question of negligence, must have regard to the age and intelligence of the plaintiff at the time the alleged injuries were received.] If his sickness was not the direct result of the acts of the defendants, was the result of other causes, or if his negligence contributed to his sickness in any degree, then he could recover only such damages as he sustained by reason of having been forcibly put on the car and taken away; that is to say, all damages he suffered prior to, and independent of his sickness, and these instructions will govern your verdict, whether under our subsequent instructions you find against George Drake only or against both defendants.

"This leads us to remark, and we call your attention particularly to the fact, that [there can be no recovery in the case against James H. Drake if he had no knowledge of the acts of his son George in putting the plaintiff on the car, knew nothing about the matter until the train had gone from the station a quarter or half a mile,] and was going at the rate of fifteen miles, or thereabouts, an hour.

"He did not make himself a joint trespasser in refusing to stop the train and allow the boy to get off, although by this refusal the injury the plaintiff sustained was produced in part by the acts of both defendants, if there was no concert between them. Where two or more commit separate trespasses tending to produce an injury to another, there is no joint liability and can be no joint recovery. This, however, will not prevent a recovery against George Drake under the instructions already given, but there must be no recovery against James H. Drake, unless the jury find from the evidence he was a joint trespasser."

Verdict for plaintiff for \$1,658, and after judgment, defendant took this writ, and alleged that the court erred as set forth in the above assignments, and in the portion of the charge included in brackets.

E. B. Parsons and Delos Rockwell, for plaintiffs in error.—The sickness of the lad was to remote a consequence of his being put on the train. The defendants are only liable for such damages as their acts directly caused, and not for the consequences of intervening causes over which they have no control, and which had no connection with putting plaintiff on the car: *Hoag v. Michigan Southern R. R. Co.*, 4 Norris, 293. See also *Pennsylvania R. R. Co. v. Kerr*, 12 P. F. Smith, 353; *Ryan v. New York Central R.*

R. Co., 35 N. Y. 210; Oil Creek R. R. Co. v. Keighron, 24 P. F. Smith, 320.

The master as such is not liable for the trespasses of his servant, unless the particular wrongful act of the servant was ordered by the master, or in other words, unless the master be the immediate cause of the injury. Even then he is not liable because he is the master, but because the act is personally and immediately his: Yeager v. Warren, 7 Casey, 219.

B. S. Bentley and Davies and Carnochan, for defendant in error.

STERRETT, J.—The trespass in this case was clearly established by undisputed testimony. The only matters about which there could be any difference of opinion were whether the defendants below were joint trespassers, whether the trespass was the proximate cause of all or only some of the injuries complained of, and, as a sequence thereof, what amount of damage the plaintiff was entitled to recover. There were all questions of fact, exclusively for the jury, and considering the charge as a whole they were submitted with instructions of which the plaintiff in error had no reason to complain. As to the fact of joint trespass, the testimony was such that the court was bound to submit it to the jury. The plaintiff himself testified that George Drake, after forcing him into the car, locked him up in the closet, and that the other defendant directed George to put him on the car. The witness says: "He caught hold of me and dragged me and put me in the car. His father, James H. Drake, said, put him on. He, George Drake, took hold of me to put me on the car; I took hold of the railing; he pulled me from it; took me in the car; put me in the closet, and left me quite a while, until the train started. I cried and asked him to let me out; they would not let me out; James H. Drake was on the platform when he told George to put me on the car. After the train started, George came and let me out, and was going to let me off the train. His father told him to keep me on, and he took me up to Columbia Cross Roads." It is true we find in the defendants' testimony a different version of the transaction, so far as the conduct of James H. Drake at the outset is concerned, but it was the exclusive province of the jury to determine which was correct. If they believed the boy, the defendants were beyond doubt joint trespassers. After speaking of the conduct of George Drake, and pronouncing it an unqualified trespass, the learned judge proceeded to say that "if James H. Drake was present, directing and consenting to the act of George in putting him on the car, they were joint trespassers, and the plaintiff is entitled to recover against both such damages as the jury find, under the evidence, he sustained at their hands. In a subsequent part of the charge, the attention of the jury was again called to this feature of the case, in such a manner

that they could not fail to comprehend the principle by which they were to be guided in determining the question of joint liability. They were told there could be no recovery against James H. Drake, "if he had no knowledge of the acts of his son in putting the plaintiff on the car, and knew nothing about the matter until the train had gone from the station a quarter or half a mile. He did not make himself a joint trespasser in refusing to stop the train and allowing the boy to get off, although by this refusal the injury the plaintiff sustained was produced in part by the acts of both defendants, if there was no concert between them. Where two or more commit separate trespasses, tending to produce an injury to another, there is no joint liability, and can be no joint recovery. This, however, will not prevent a recovery against George Drake under the instructions already given, but there must be no recovery against James H. Drake unless the jury find from the evidence that he was a joint trespasser." What more could this defendant ask at the hands of the court? Under the instructions thus given, the jury, if they had adopted his version of the transaction, would have been bound to return a verdict in his favor. The result evidently showed that they did not do so. They believed the plaintiff's statement, and we are not at all prepared to say they were not right in so doing. The circumstances disclosed by the testimony tended rather to corroborate him, and at the same time render it difficult to understand how such an outrage could occur while the train was stopping at the station, and the conductor not be aware of it. If he was present, and cognizant of the trespass that was being committed, he owed it as a duty to himself and all concerned to assert his authority and prevent further wrong, and if he neglected to do so, it would not be unreasonable to infer consent thereto on his part. According to his own testimony, he certainly manifested great indifference. Referring to the time the train started from the depot, he says: "I heard an unusual noise in the baggage-car soon after I got in; sounded like noise proceeding from a human creature; I was collecting fare of passengers; after I did that, opened the door and went in there." If the "unusual noise," "proceeding from a human creature," had commanded his immediate attention, as it should have done, he could have released the boy, and set him off the train while he was yet in sight of home. His conduct was not calculated to elicit the sympathy of the jury, and if it resulted unduly to his prejudice, the remedy was solely with the court below. The question of joint liability was submitted with full and guarded instructions, of which he has no reason to complain, and the verdict must be accepted as conclusive. The next question, to which some of the assignments of error are directed, is that of proximate cause. Upon an admitted state of facts this would ordinarily be a question of law for the court: *Hoag v. Lake Shore and M. S. R. R. Co.*, 4 Norris, 293. In the

present case the most material facts were in dispute, and the court could do nothing else than submit the testimony to the jury, with proper instructions to determine the facts, apply them to the principles of law, and render their verdict accordingly. It was conceded that the plaintiff had sustained some injury, for which he was entitled to recover, at least against one of the defendants, but it was denied that his sickness and subsequent suffering, in relation to which considerable testimony was introduced, was the result of the trespass. In other words, it was contended that the trespass was not the proximate cause of these injuries. This was the main question in the case, and in submitting it to the jury the learned judge instructed them that if the plaintiff's sickness was the direct result of the defendants' acts, "that is, if their acts, in connection with the plaintiff's fright, excitement and exertion, in returning home, were the immediate cause of his sickness, he is entitled to recover damages as well for the injuries resulting from his sickness as from being put on the car and carried away. But he cannot recover for injuries resulting from his sickness if his own conduct constituted negligence on his part, which contributed in any degree to such sickness. What would be negligence in an adult might not be negligence in a boy of ten years of age, and hence, the jury, in passing on the question of negligence, must have regard to the age and intelligence of the plaintiff at the time the alleged injuries were received. If his sickness was not the direct result of the acts of the defendants—was the result of other causes, or if his negligence contributed to his sickness in any degree, then he could recover only such damages as he sustained by reason of having been forcibly put on the car and taken away; that is to say, all damages he suffered prior to and independent of his sickness; and these instructions will govern your verdict whether under our subsequent instructions you find against George Drake only, or against both defendants." The instruction thus given was both appropriate and adequate, and is here referred to at length for the purpose of showing how some of the detached sentences of the charge assigned for error are explained and qualified by the context. If the defendants below had desired other or more specific instructions on the subject, they should have preferred their request to the court. In *Hoag v. R. R. Co.*, supra, our brother PAXSON says: "The doctrine laid down in the *R. R. Co. v. Hope*, and to be gathered incidently perhaps from *Raydure v. Knight*, is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another, and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen and necessary result of such cause. * * * In determining what is proximate cause, the true rule is, that the injury must be the natural and prob-

able consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." In view of the testimony in this case, the court could not undertake to decide that the trespass had no connection with the plaintiff's sickness; that the latter was not the natural and probable consequence of the former. Nor that it was not such a consequence as under the circumstances might and ought to have been foreseen by the defendants as likely to flow from their conduct. These were necessarily questions for the jury. A child of tender years was forcibly seized, thrust into a car, locked up in a dark closet, and carried five miles from home, released late in the evening, and left to find his way home as best he could. Was it an unnatural or improbable result, that he should be excited, nervous, terrified; that he should make his way home if he could find it, with all possible speed, and without thought of consequences? Was it at all unnatural or improbable, that the abuse, excitement and exposure would result in some form of illness, more or less severe? And were not these such natural and probable consequences as might and ought to have been seen by those who committed the trespass? If they were, it was not at all necessary that they might and ought to have foreseen the nature, severity or extent of such illness. To hold that this was essential would be requiring entirely too much in the interest of the wrongdoer. The actual results depend very much on the physical condition and constitutional tendencies of the person injured; in some cases they might not be so serious, in others more serious, and even permanent, as in the present case. We fail to see any error, either in the submission of the question to the jury, or in the manner in which it was done. As the case stood upon the testimony, there was no material error in sustaining the objections to questions put to Dr. Axtell and Cornelius Sayles. What has been said refers sufficiently to all the assignments of error that appear to call for special notice. They, as well as those not specially referred to, are not sustained.

Judgment affirmed.

SHAESWOOD, C. J., MERCUR and PAXSON, JJ., dissented

GEORGE W. EVERHART

v.

THE TERRE HAUTE AND INDIANAPOLIS R. R. Co.

(*Advance Case, Indiana. January 26, 1882.*)

The plaintiff was requested by a brakeman of the defendant company to ascend a moving car of the defendant and set a brake, which he did, and

while so engaged he was injured by other servants carelessly running other cars against the one he was upon. *Held*, That he could not recover of the defendant the damages he had sustained.

A mere volunteer cannot recover damages he may have sustained by the carelessness of the servants of the person whom he has volunteered to aid.

WORDEN, J.—Complaint by the appellant against the appellee in two paragraphs. The first alleges "that the defendant is a corporation organized under the laws of the State of Indiana, and as such owns and operates a railroad line from Indianapolis to Terre Haute, Indiana; and also certain lines of track laid and used for switching and making up freight and passenger trains in the city of Indianapolis, Indiana; that on the 20th day of August, 1879, the plaintiff (who is a miner) was returning home along South West street in said city, and on coming to the point where the tracks of the defendant cross said West street was stopped by several flat, or coal cars which were moving slowly across said street; that at this moment a servant, an employé of the defendant who was employed on and about said switching tracks, requested the plaintiff to get upon one of said coal cars, and apply the brake thereto, so as to bring it to a full stop; that the plaintiff acceded to this request, and got upon one of the said coal cars, and laid hold of the brake wheel thereof, to do as he had been requested; that certain other employés of the defendant, who had charge of a switching engine belonging to the defendant to which was attached some other empty coal cars, undertook to make what is known as a running switch, and carelessly, negligently, wilfully and recklessly cut off several coal cars from the engine, which, under a considerable speed, ran on eastward, and wilfully, recklessly, carelessly and negligently left them without any brakeman, or other person to take care of them or stop them; and thus left alone they ran into and collided heavily with the car on which the plaintiff was; and the shock threw the plaintiff off and upon the ground, and under the said cars; and the cars ran against and upon him, mangling him severely, without the fault or negligence of the plaintiff, and in a manner which he was powerless to prevent; that in the crush of the wheels created by the collision aforesaid, the bones of his right foot were broken and mashed, his right leg skinned for a considerable distance, and his left badly bruised, and a deep gash cut in his groin; and he has been ever since confined to his bed, and has suffered and still suffers great pain and anguish therefrom. He is informed that these injuries are of a permanent character, and that his left foot is crippled for life, and he will be confined to his bed for many months to come. . . . He further avers that the loosening of said cars from the engine on the running switch was so sudden that he could take no means to avoid the injury, as the cars were upon him before he could see or provide for the danger."

The second paragraph alleges the organization of the defendant

as a corporation under the laws of the State of Indiana; and that as such corporation it "owns and operates a railroad line leading from Indianapolis westward across White river; and also certain lines of track used principally for switching, and as side tracks which have been laid down in and upon a public street in the city of Indianapolis, called Louisiana street, and along the same from Tennessee street to White river, within the limits of said city; that at a point or place in said Louisiana street,—a certain other street of said city, called West street,—crosses said Louisiana street, and the said crossing has been filled with railway tracks—main and side tracks; and from thence westward to said White river, upon and along which the defendant's engines and cars are almost constantly moving, attached to coal and freight cars; that on the 20th of August, 1879, the plaintiff (who is a miner) was returning home and walking upon the sidewalk of South West street, in said city of Indianapolis, and coming to its intersection with said Louisiana street, across which his route lay, was walking carefully across said last named street, and when about two-thirds of the way across said Louisiana street, found his progress barred by several empty coal or flat cars, which were slowly moving westward entirely without any person to manage or stop them, and unattached to any engine; that as plaintiff stopped, a servant and employé of the defendant, who was engaged at the time in looking after and oiling the defendant's cars upon and along said tracks, directed the plaintiff to climb upon said empty cars, and apply the brakes to them, and stop them; plaintiff did so without any delay, and while the cars were slowly moving westward along one of the tracks aforesaid, applied the brakes with all his force to stop the car he was on; that during this time certain servants and employés of the defendant, in charge of one of the defendant's switching engines, were engaged in moving and switching cars therewith, at the western extremity of Louisiana street, near the bridge over White river, where the side or switching tracks join, or unite with the main track used by the defendant; and with said engine pushed certain empty flat coal cars from the west of the said junction down upon the side track on which were the cars upon one of which the plaintiff was standing at the brake thereof; and wilfully, recklessly, and negligently allowed said coal cars to run upon and along said track, disconnected and cut off from the engine that had started them, entirely wild and without any person upon them to control the brakes thereof, and at a dangerous rate of speed; and the motion they had thereby acquired, drove and propelled them swiftly, and all unseen by, and without the knowledge of this plaintiff, who was engaged at the time in tightening the brakes on the car he was upon, and suddenly ran against the cars on which the plaintiff was riding, with great force; and the shock of the collision threw the plaintiff off the car and upon the track, and under the wheels of

the cars, which ran upon him, wounding him in several places, and mangling his foot as hereinafter set forth. And the plaintiff says he had no reason to expect, and did not expect, and did not know that the defendant's agents or servants, or any other person would allow said cars to be pushed along and upon said track from the west end thereof, while the car he was on was moving along said track westward, nor that they would push said cars down said track and disconnect them from the engine, and allow them to run wild and unattended by any person to manage the brakes thereon, nor that any cars were coming, until they were so near, as to make a collision inevitable; that he had no means, or knowledge whereby he could foresee the danger, and that it came so suddenly upon him that he was unable to prevent it. He avers that he was not guilty of any negligence or carelessness at, or before the time of the collision, and that as soon as he was aware of the danger he used every effort to prevent it, but without success. He says that if the cars approaching from the west had been properly manned by a sufficient number of persons to apply the brakes in time the collision would have been prevented; and that if the defendant's agents, or employes in charge of the switch engine had taken proper care, and the means at hand to know whether the track was clear, the injury to the plaintiff would not have happened; and that if the defendant's servants in charge of the engine had not pushed the cars down the side track with great speed, and wilfully and recklessly suffered them to run wild and unattended the collision would not have taken place; that on getting upon the car to stop it, by the use of the brake, he did so solely at the request of the defendant's servant, an employe as aforesaid, and without any reward, or remuneration, or promise, or expectation of any reward, or remuneration."

The paragraph then proceeds to allege the extent of the plaintiff's injuries, and the expenses incurred; and claims judgment in the sum of twenty thousand dollars.

A demurrer to each paragraph of the complaint for want of sufficient facts was sustained; and final judgment rendered for the defendant. Judgment affirmed on appeal to the general term.

On the authority of the cases of *Legg v. Midland R. R. Co.*, H. & N. 773; *Flower v. Pennsylvania R. R. Co.*, 69 Penn. 210; *New Orleans, etc., R. R. Co. v. Harrison*, 48 Miss. 112; cases which seem to us to be entirely in point in principle, we feel constrained to hold that on the facts stated the defendant is not liable; and, therefore, that the ruling below was right.

If the plaintiff was to be regarded as having been the servant of the defendant, it would seem that he could not recover for the injury caused by the negligence of his fellow servants.

But it seems to us that on the facts stated in either paragraph of the complaint, he cannot be regarded as having been the servant of

the defendants. See *Kelly v. Johnson*, 128 Mass. 530. He was not requested or directed to man the brake, by any one that is shown to have had any authority from the defendant to make such employment.

In the first paragraph it is alleged that "a servant and employé of the defendant who was employed on and about said switching tracks," requested the plaintiff to get upon one of the cars and apply the brake, etc.; and in the second paragraph it is averred that "servant, an employé of the defendant, who was employed at the time, in looking after and oiling the defendant's cars, upon and along said tracks," directed the plaintiff, etc.

The plaintiff was a mere volunteer consenting at the request or direction of an employé of the defendant, to perform service which should have been performed by the employés themselves; and while he cannot be regarded as an employé, he is in no better condition than if he had been.

Nor is he in any better condition legally than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he was not requested or directed to get upon the car and apply the brake, by any one having power from the defendant to authorize him to do so. The defendant owed him no duty either as an employé, passenger, or traveller upon a highway crossed by the railroad. Under the circumstances the authorities above cited make it clear that the defendant is not liable.

If there had been an urgent necessity for some one other than an employé of the defendant, to get upon the car or cars and apply the brakes in order to prevent a destruction of human life, or valuable property, possibly the case might be different. But no such necessity was shown.

The judgment below is affirmed with costs.

The plaintiff, who was in no way connected with the railway company, was standing at one of its crossings, when the conductor, who was also acting as engineer of the train, ordered him to go in and uncouple the cars. He refused at first, but in fear of some bodily harm (he was only fifteen years of age) from the railway employé, who had cursed and threatened to beat him if he refused, was forced to perform the service required. After he had uncoupled the cars the train commenced moving, the tender came against his shoulder and knocked him under the cars and the tender wheels ran over his left leg, injuring it so severely that he was compelled to suffer amputation. There was no brakeman on the train. He was not bound to obey the order under which he acted and could have gotten away had he seen proper and tried. He did not know he could uncouple the train when he went in, but thought he could. The train was backing at the time. It was held that the company was not liable, he being a mere volunteer; and it

was held further that he was guilty of contributory negligence; *N. O. J. & G. N. R. R. Co. v. Harrison*, 48 Miss. 112; *S. C. 12 Amer. Rep.*, 356. This case is more distinguished from *Lovett v. Salem and South Denvers R. R. Co.*, 9 Aller. 557, which was a case where a boy took passage on a street railway car without any intention to pay his fare, and after remaining a while he was ordered by the conductor to leave when the car was in rapid motion, which he did and was injured. In that case it was held that the conductor was in the line of his duty while ordering the boy off the car, and hence, bound to act with care and prudence; while in the case at bar the conductor had no authority to order the boy to uncouple the cars, and if he did so he was not acting within the line of his duty. The same distinction was made with reference to the case of *Klim. v. The Central Pacific R. R. Co.*, 37 Cal. 400 S. C., 39 Cal. 587; *Lalor v. Ch. B. & L. R. R. Co.*, 52 Ill. 401, was an action under the statute of that State by the widow and administratrix of her deceased husband, who was killed while employed at the depot of the company as a common laborer. While so employed, he was ordered by the superintendent or foreman of the company, employed to manage, direct, and superintend the affairs of the company about the depot, to couple and connect a freight car with the other cars if attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, and while so engaged having to go between the cars for the purpose, the engine was so carelessly managed as to bring the cars together with great force, by reason of which he was crushed to death. It was held that the company was constructively present in the person of the superintendent, whose command the deceased was bound to obey, and that thus, by the direct command of the company he was exposed to the peril by which he lost his life. "We place this case on the ground of misconduct of the company in exposing deceased to this peril, and when so exposed, in so carelessly mismanaging the engine as to cause his death." Where the plaintiff, a lad, placed himself between the wheels of a carriage, and the defendant's servant seeing him thus, started the horses attached thereto, and injured the plaintiff, it was held that the master was not liable. *Wright v. Wilcox*, 19 Wend. 343. At a station where the defendant's train of cars was standing, the engine, tender and one car ran down to the water-tank in charge of the fireman, who asked a boy ten years old, standing there, to put in the hose and turn on the water. While the boy was climbing on the tender to comply with the request, some detached cars belonging to the train came down with ordinary force, and struck the car near to the tender, whereby the boy was killed. It was held that the company was not liable to the boy's parents. The true point of this case is, that in climbing upon the side or tender of the engine, to perform the fireman's duty, the son of the plaintiff

did not come within the protection of the company. To recover, the company must have come under duty to him, which made his protection necessary. Viewing him as an employé, at the request of the fireman, the relation itself would destroy his right of action." *Flower v. The Pennsylvania Co.*, 69 Pa. St. 210. The same distinction is made with reference to the ejection of passengers as was drawn in the *Mississippi* case. *Pennsylvania Co. v. Books*, 57 Pa. St. 339.

The rule that a master is not generally responsible to his servants for injury occasioned by the negligence of a fellow-servant in the course of their employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work. *Degg v. Midland R. R. W. Co.*, 1 H. & N. 773; S. C. 3 Jus. (N. S.) 395; 26 L. J. (Exch.) 171. The above case was where a volunteer was injured at a turn-table by the negligence of the company's servants. So when the deceased uncoupled cars at the request of a servant of the company and was killed while so acting, it was held that the company was not liable. A volunteer can impose no greater duty on the master than a hired servant. *Osborne v. Knox and Lincoln R. R. Co.*, 68 Me. 49 *Abraham v. Reynolds*, 5 H. & N. 142; S. C. 6 Jus. (N. S.) 53; *Potter v. Faulkner*, 8 Jus. (N. S.) 259.

On *Holmer v. Northeastern R. W. Co.*, L. R. 4 Exch. 254, the plaintiff was a person entitled to delivery of a wagon load of coal from the defendant, a railway company. The usual mode of delivery at the tip or drop was impossible by reason of the crowded state of the station. He was allowed by the company's station-master to go to another place, where the wagon was to get the coal, and, while so doing, he fell through a hole, owing to the negligent keeping of the company's premises. It was held that he was engaged, with the consent of the company, in a transaction of interest to both parties, which prevented him from being there as a volunteer, and entitled him to have the company's premises kept in a reasonably safe condition. "In one sense the plaintiff was a licensee; but he was not a mere licensee, and the word 'mere' has a very qualifying operation. We must infer from the silence of the station-master that he acquiesced in the plaintiff's going on to the siding for the purpose of getting coal from his wagon in the way he did get it." S. C. 3 Jus. (N. S.) 395. This one was affirmed in the *Exchequer Chamber* L. R., 6 Exch. 123. *Wright v. London, etc., R. R. Co.* L. R., 10 Q. B. 298; S. C. affirmed, 1 Q. B. Div. 252. In the latter case the plaintiff shipped a heifer by the defendant's railway to one of their stations. On the arrival of the train at the station, there being only two persons available to "shunt" the horse-box or car in which the animal had been shipped, to the siding from which alone it could be delivered to the plaintiff, he, in order to save delay, assisted in shunting the horse-box,

and while he was so assisting, he was run against and injured, in consequence of the train being negligently allowed by the defendant's servants to come out of the siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting, and that he assented to his doing so. It was held that the plaintiff was not a mere volunteer, but that he was on the defendant's premises with their consent, for the purpose of expediting the delivery of his own goods, and that they were liable to him for the negligence of their servants. The distinction between the case at bar and the last two cases is that in the former the plaintiff was not assisting the servants of the defendant, at their request, for the purpose of expediting his own business or that of his master, while in the two cases cited the plaintiffs were so assisting. It is obvious that the real difficulty in these cases is to determine, on the facts, whether the person injured was a mere volunteer, or acting in the furtherance of his own or his master's business.

While the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his wagon, the plaintiff, who was sitting with a wagon to receive a load of cotton for his master, at the request of the defendant's carter, assisted him; and, in consequence of the negligence of the defendant's porters, a bale of cotton fell on the plaintiff, and he was injured. It was held that he could not recover of the defendant. *Potter v. Faulkner*, *Supra*. Cited also in 10 Weekly Rep. 97, 5 Lat. (N. S.) 455; 31 L. J. (Q. B.) 30; 1 Bast & S. 800.

A passer-by who was casually appealed to by a workman, for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a volunteer assistant, so as to exonerate the workman's negligent mode of doing the work. The workmen of the defendant, a gas fitter, having come upon two pipes in the course of their digging in the road, and being in doubt as to which contained gas, asked information of the plaintiff who happened to be passing. The plaintiff thereupon got into the trench and pointed out the gas-main, into which the defendant's workman proceeded to make a hole for the insertion of a service-pipe. This was done in a manner unnecessarily hazardous, in consequence a chip of the metal entered the plaintiff's eye, while he stood by looking on, and seriously injured him, for which the plaintiff was held entitled to recover. *Cleveland v. Spies*, 16 C. B. (N. S.) 398.

The plaintiff in *Kelly v. Johnson*, 128 Mass. 530; was a machinist in the employ of one Winchester, a builder of steam engines and machinery. The defendant, a teamster, was employed to transport an engine from Winchester's shop to the railroad station. He went with his team and servants to do this work. After the engine was loaded upon the truck he falsely represented to the plaintiff that Winchester had agreed to send two of his men to the

station to assist in loading the engine upon the car. The plaintiff was thereby induced to go to the station to assist the defendant, and while putting the engine upon the car was injured. It was held that the plaintiff did not become the servant of the defendant so as to be remediless for the injury he had so received by the negligence of the latter's servant. So where plaintiff went on board of the defendant's train, not as a passenger, but to find seats for a lady and child whom he had in charge, and after finding seats he attempted to get off the train and in so doing was injured. Held, that even though he got off after the train was in motion, yet if sufficient notice of the start and a reasonable time to get off were not given, the company was liable. *Doss v. M. K. & T. R. R. Co.*, 59 Mo. 27.

And where persons are entrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal part in its performance, and having no funds at their disposal, out of which compensation for injury, arising from the negligent acts of the persons employed by them, can be made, are exempt from liability in respect to such negligence. The damage commissioners of the Middle Level Fens were held entitled to this exemption in an action for damages in not properly maintaining a sluice which they were bound to maintain. *Cox. v. Wise*, Q. B. 33 L. J. (N. S.) 281; S. C. 4 Amer. L. Reg. 316.

Where a conductor had exclusive control of a train and all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to apply with the order the boy was injured, it was held that the railroad company was not liable. *Sherman v. H. & St. J. R. R. Co.*, 72 Mo. 62. See *Michigan Cent. R. R. Co. v. Leahrey*, 10 Mich. 200; *Railroad Company v. Fort*, 17 Wall 553.

Where a servant or agent employs a stranger to work for his master or principal without the master's or principal's knowledge, the liability of the master to such stranger for injuries received necessarily turns upon the authority of such servant or agent to so employ such stranger; and if such servant or agent had no power to employ him, then he is necessarily in the condition of a volunteer, and cannot recover, as decided in the principle case; some of the authorities cited above turn upon this point.

ST. LOUIS, I. M. & S. RY. CO.

v.

FREEMAN.

(86 *Arkansas Reports*, 41. *November Term*, 1890.)

Railways are bound to use ordinary prudence, foresight and caution to avoid injury to persons or property on or near their tracks; and ordinary care varies with the circumstances and the subject-matter endangered, and is such care as persons of ordinary prudence would use in similar circumstances.

A railway company, or other person, is not liable for negligence where the plaintiff by his own negligence has contributed to the injury, unless the injury was wilful or resulted from a want of ordinary care on the part of the defendant to avert it, after the discovery of the negligence of the plaintiff; and this without regard to the degrees of negligence on each side.

If a parent permit a young child without sufficient discretion to get out of the way of a running train, to go alone upon a railway track, this is *prima facie* evidence of negligence, and he can not recover against the company for the death of the child from the running of the train, unless the trainmen, after discovering the child, omitted to use reasonable precaution to avoid the collision.

The fact that a child under the age of discretion is upon a railroad track, where trains are frequently passing, without a proper attendant, is only *prima facie* evidence of negligence in a parent, and is subject to explanation; and it is for the jury to determine from the evidence, whether the explanation is sufficient to repel the presumption of negligence.

For parents living near a railroad where trains are frequently passing, to leave a child at their house, too young for discretion, and without an attendant of sufficient discretion, and without any precaution to prevent its escape from the house, is gross negligence; and if the child gets upon the track and is killed, the company is not responsible to the parent, unless the trainmen, after discovering the child, omit the use of reasonable precaution to avoid the injury.

A parent may recover of a railroad company damages for the loss of future services of a child negligently killed by its train.

Where injuries received by a child from a running train would not prove fatal but for the want of reasonable care of the parent after the injury, he can not aggravate his damages against the company beyond damages for the wounding, etc.

The measure of damages to a parent for killing his child is the pecuniary value of his services during minority, and the cost and expense incurred by the parent on account of the injury, less the reasonable and necessary expense of raising it: the value to be such as is ordinary with children in like condition and station in life, without regard to the relationship between them, or to the parent's feelings or the child's sufferings.

APPEAL from Pulaski Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.

J. M. Moore for appellant:

Plaintiff should have used ordinary care. *Shearman & Red.* on Negligence, secs. 29, 30, 32, 33; 72 *Penn St.*, 169; 24 *Ohio St.*, 670; 49 *Ind.*, 104. It is *per se* negligence to leave a child unpro-

ted in danger from the railroad. 4 Allen, 283; 57 Penn. St., 172; 21 Wend., 615.

Doctrine of contributory negligence does not depend on comparison. 21 Iowa, 15; 32 ib., 467; 23 Conn., 437; 33 N. J. Law, 434; 49 Penn. St., 186; 22 Wis., 245; 5 Hill (N. Y.), 282; 24 N. Y., 430. Where it ceases to operate. Shear. & Red. on Neg., sec. 36. Also, sec. 30, and cases cited. 26 Ark., 6.

Hypothetical instructions most proper. 104 Mass., 455; 12 Pick., 176, and cases cited.

Road not bound to have anticipated a child being on the track. Shear. and Red. on Neg., secs. 481-2.

Defendant was entitled to an unbiased jury. 24 Ark., 346; 19 Ark., 163; ib., 534.

Z. P. Farr, Thomas Fletcher and Robert A. Howard, for appellee:

The amendment made by plaintiff below, was not necessary (Gantt's Digest, sec. 4611); but, if so, court could allow it. Ib., 4611, 4616. Rights of plaintiffs not affected. Ib., 4619; Nash's Pl. and Pr., 328; Newman's do., 706-17-18; 31 Ark., 162; 30 Ark., 312.

Objections to charges not specific. 32 Ark., 224.

On amount of care required by appellant. Memphis and L. R. R. Co. v. Barker (MS.); Wharton on Neg., 309, 314; Cooley on Torts, 680.

EAKIN, J.—The facts in this case are peculiar. An empty train of the appellant railway company, consisting of the engine, tender and several cars, was running on irregular time, moderately, on a down grade, keeping a look out for a regular train to avoid collision. Some four or five employes of the road were along. About one hundred yards in front of the engine an object was observed to crawl up on the track, from the weeds and cross-ties on one side. It resembled a hog so that they were all completely deceived. The alarm-whistle, usual in such cases, was given, and the brakes were applied, so as to retard, but not stop, the motion of the train. After proceeding about two-thirds of the intervening way, they, much to their consternation, discovered that it was a child. Immediately, the engine was reversed, the whistle sounded, the brakes continued, and every effort was faithfully made to stop the train, but without success. It passed over the child and stopped about the engine's length ahead. Death ensued. The parents of the child lived in an uninclosed house about one hundred feet from the track. Neither was at home. The father had left first that morning, leaving at home the mother, a child about eighteen months old, and two other children from three to seven years of age. The mother left afterwards to visit a neighbor, leaving the children alone.

The father, appellee, sued the road, under the act of February 3, 1875. (1 Pamph. Acts, c. 75, p. 133.) The first section of the act provides that "all railroads which are now, or may be hereafter, built and operated, in whole or in part, in this state, shall be responsible for all damages to persons and property done or caused by the running of trains in this state." The third section provides when the person killed or wounded is a minor, the father, if living, "may sue for and recover such damages as the court or jury trying the case may assess."

Negligence was averred, and denied, and contributory negligence charged by defendant.

Upon the trial, after part of the testimony had been heard, plaintiff, against objections, was allowed to amend his complaint, by charging that, because of the injury, he was deprived of the services of the child, and would be until she would have become of age.

Plaintiff recovered a verdict for \$1,100, from which, after the overruling of a motion for a new trial, defendant appealed.

Such grounds of the motion as are considered material, will be stated and determined in the opinion, which will be confined to errors urged in argument.

Railways, as well as all other modes of public conveyance, are attended with danger to persons and property. Their advantages in the progress of civilization, to general convenience and the development of economical resources, are universally conceded to overbalance the dangers incident to a proper and careful use of their franchises. They have been encouraged by all civilized nations, and except in rare cases and under statutes, have not been held insurers of the lives or property of others exposed to danger by their vicinity or operations.

Upon the other hand, they are not allowed to trifle with, or disregard, these rights of the citizens. The harmonious adjustment results in this, that railways are bound to use ordinary prudence, foresight and caution to avoid injuries to persons or property on, or near, their tracks. The difficulty is not in the law, but in its application to the special facts, in which juries are entitled to the assistance of the courts.

It is matter of law that this "ordinary care" imposed upon railways, to be exercised by their employees, varies with the circumstances and the subject-matter endangered. For example, ordinary care would require more precaution in running through streets of a village, or populous neighborhood, at night, than through vast outlying forests or prairies in daylight; and it is the instinct of humanity, as well as a rule of law, that everywhere ordinary care requires more precautions against endangering the lives of persons than of cattle. Still it is ordinary care in each case, which means such care as persons of ordinary prudence would use in similar cir-

circumstances. This would be naturally greater, where vast interests are involved, than in case of smaller ones, and since no interests can be weighed against human life, it would, with all good men, be greatest to avoid the death of a human being. (See cases cited in Shearman & Redfield's Work on Negligence, sec. 24 and notes.

Further, it is a plain principle of law that no railway company, nor other person, can be held liable for negligence, where the plaintiff, by his own negligence, has contributed to the injury, unless it was a wilful injury, or one resulting from the want of ordinary care on the part of defendant to avert it, after the negligence of the plaintiff had been discovered. The weight of reason and authority makes this qualification independent of the degrees of negligence on each side. Although that of the defendant may have been, at first, the greater, the plaintiff can not recover if any ordinary negligence on his part contributed to the injury, unless, as before stated, the defendant, becoming aware of plaintiff's negligence, and the impending danger, had then and thereafter failed to use such care as the circumstances required to avert the calamity, and which, in the case of human life, would be the greatest care.

If the jury were made plainly to understand these principles, the facts were properly committed to them for their application; and there is, therefore, no reason to disturb their verdict as to the main issue, for the want or conflict of evidence. The circumstances under which the child was left, the conduct of the parents, the speed of the train, the watchfulness of the employes, the measures taken to avert danger when they thought it was a hog, and those taken after they discovered the shocking mistake, were all matters upon which, from their general knowledge of human affairs, they might determine whether any negligence was imputable to the company, either as originally committed, or after they had seen the consequences of the negligence of others in permitting the child to be upon the track, if any had been committed, of which last element, also, they were the judges. The amount recovered, depending upon the true measure of damages, is a matter for separate consideration.

This leads us to the examination of the instructions, to see whether or not the principles, above indicated, were plainly presented to them for their action. They were substantially, and in effect, as follows:

For the plaintiff, the court, in the first place, instructed, generally, that defendants were liable if, from want of ordinary care on the part of the employes, the train ran over the child and killed it, unless it were found, also, that plaintiff was precluded from recovery by his own contributory negligence; and that the measure of damages was a just pecuniary compensation for loss of the services of the child.

2. That, in determining the care and watchfulness required of

those having the custody of the child, the jury might consider their condition and situation in life.

3. That, although the child might have been improperly on the track, the defendants were still bound to exercise ordinary care and diligence to avert running over it.

4. That, if the employes, by the exercise of ordinary skill and caution, might have observed the child on the track, and recognized it as such in time to stop the train, the defendants were liable, unless the plaintiff was found precluded by contributory negligence.

Defendant asked nine instructions, which were all refused, but which were, three of them, modified by the court. The first was general, and as modified and given, embraced the same points, substantially, as the first given for plaintiff, save as to the measure of damages, which was omitted.

2. If the employes were exercising due care in looking out for obstacles, saw the child and mistook it for another object, then used such care as would have been reasonable and prudent if it had been the object supposed, and then, discovering it to be a child, used every possible precaution to avoid injuring it, there was no negligence. This instruction was only modified so as to express that the mistake must have been made in the exercise of reasonable care and diligence under the circumstances.

3. If the child was under the age of discretion, and was on the railroad, where trains were frequently passing, without a proper attendant, this was negligence on the part of plaintiff, which would preclude his recovery.

This instruction was properly refused. It made the facts conclusive of negligence. They were only *prima facie*, and subject to explanation. It was for the jury to determine from all the facts whether such explanation of the unfortunate exposure appeared, as would repel the presumption of negligence on the part of the parents.

4. The substance of this instruction was, that if a parent permits a young child to place itself in the way of danger, he shall be taken to have assumed that the child would exercise due diligence to avoid it; and therefore, if the jury should find that the child was permitted to go on the railroad alone, and that a person of ordinary discretion would in that position have gotten out of the way of the train, and the child did not, they should find for defendant, unless the train men, after knowledge that a child was on the track, omitted reasonable precaution to avoid the collision.

In an action by a parent, this instruction was strictly correct, and there was evidence to which it might apply. The fact that the child was on the track was sufficient *prima facie* to raise the presumption that it was there by permission. The authorities collected and cited upon this point, in the note to section 48 of Shear. & Red.

on Negligence, quoted above, seem conclusive, and the principle is consonant with reason.

The onus was thrown on the plaintiff to overcome this presumption. Whether he had done so was a matter which should have been left to the jury. The instruction should have been given as asked.

5. The court was asked by this instruction to direct the jury that if they found that the parents lived near by the railroad, where trains frequently passed; that the child was too young for discretion; that the parents left it without an attendant of sufficient discretion, and without any precaution to prevent its escape from the house, and the child crawled on the track and was killed, they should find for defendant, unless they further found that the employés of the train omitted to take reasonable precaution to avoid the accident after they discovered the position of the child and that it was a child. This, too, was substantially correct, and should have been given. The facts stated would have in themselves amounted to gross negligence.

6. This was on the point of contributory negligence, where the injury is found to have been caused by negligence on both sides. It asked the court to instruct the jury, if they so found negligence on both sides, the defendants were not liable, unless its servants, after they discovered the object to be a child, could, by reasonable care, have avoided it, although their failure to discover the "child's position" was the result of carelessness and inattention. By "child's position" was evidently meant, that it was a child on the track, and not a hog.

The doctrine of contributory negligence has no place where there is not negligence on both sides. It is invoked to neutralize a right on plaintiff's part, which would otherwise exist, and from its nature it makes a good defense against actual negligence of defendant. Its scope does not extend, however, to allow defendant to inflict a wanton or careless injury. It would be extending it too much, we think, to make it a defense to a general and reckless disregard of human life, by running cars without any care as to whom or what they might hurt. A gross and general carelessness, being proved in the running of the cars, or evidence tending to that, might have made it proper to refuse that instruction. But there was nothing of the sort to which the instruction could apply. All that the jury might have possibly presumed would be, that in the special case, and with regard to the special injury, they might earlier, by close attention, have seen that it was a child before they did. Against such special negligence, the doctrine of contributory negligence may be fairly used as a defense, unless, after the consequences of the plaintiff's negligence had been discovered, and when the injury might still have been avoided, they failed to use ordinary care appropriate to the subject-matter, being greatest, of course, where

human life is endangered. The sixth instruction seems framed to apply these principles to the facts of the case as developed by the evidence, leaving the conclusion to the jury in accordance with their findings. It should have been given.

7. This instruction declared it negligence in the parents to leave the child in charge of a child six or seven years of age, near a railroad where trains were frequently passing. This was not matter of law. The jury should have been left to judge from the evidence, whether, according to their judgment of the usual capacity of such children, the precautions taken to guard the child were reasonably sufficient to relieve the parents of negligence.

The instruction was properly refused.

8. This was to the effect that the plaintiff could not recover prospective damages for loss of future services of the child. This was properly refused.

9. This instruction was to the effect, that if the jury found that the plaintiff and those in charge of the child were careless, and failed to follow the directions of the physicians in attendance, and thus contributed to its death, plaintiff could not recover.

The instruction was too broad. The statute (sec. 3) gives the right of action to the father in case of either the killing or wounding of a minor. This accrued at the time of the accident, if at all, at least to the extent of the wounding. Some damage might be recovered for that if death had not ensued. The jury may judge, from the nature of the injury, that damage, to some extent, would necessarily attend it. The complaint sets forth the facts of the running over, bruising and wounding, as well as the death. It would seem, indeed, upon general principles, that if the jury should believe that the injuries might not have resulted in death but for want of reasonable care on the part of the plaintiff, he ought not thus to be allowed to aggravate his damages by conduct after the injury, but it is not necessary now to construe the statute in that regard. The instruction was properly refused.

10. This regards damages. It proposes to instruct the jury that the measure is the pecuniary value of the child's services during minority less the reasonable and necessary expense of raising it during minority, and the costs and expenses incurred by the parent on account of the injury; the value of services to be such as are ordinary with children in the same condition and station in life, without regard to any peculiar value the plaintiff might attach to the child's services by reason of the relations existing between them, and without regard to the parents' feelings or the child's sufferings. The court refusing this as asked, modified it by directing the jury that they could not regard the peculiar value which might attach to the services by reason of the relation "except so far as they may find such relation to enhance the pecuniary value of the services."

This modification seems to have been based upon the testimony of the father, who, against the objection of the defendant, was allowed to testify as to the value of the child's services to him. In response to a question of defendant, as follows: "Would the child's services be worth eighteen dollars per month at the age of seven years?" he answered: "I would not begin to take it for my child—just its presence would be worth that. It would be worth more than any other person's child would. I could put more confidence in it." And further on he said: "I can't say why it would be worth more than other children. I can trust a child that I raised myself more than I could any other." By the modification, the jury were advised that they, on account of this confidence, might attach a higher pecuniary value to the child's services if rendered to the father, than would be reasonable if rendered to any one else. We think the honorable circuit judge was in this mistaken. The courts, in the construction of like statutes, have firmly and positively renounced all sentiment. They have dealt with them as involving cold, pecuniary considerations alone, without any regard to the sympathy which the judges might feel individually in the distress and bereavement of the parent. In an action by a master for loss of services of a servant, I have never heard that he could recover damages for loss of service enhanced above their ordinary market value in like cases, by the ease of mind which the master might feel from such confidence and trust. There would be no limit to damages under such a rule. A merchant might be willing to pay thousands of dollars rather than part with a clerk or confidential agent, upon whose fidelity he might rely, because of ties of gratitude or love; but it has never been considered that such a clerk could recover, in a suit for services, more than they would be worth to others in like cases, on account of his capacity and character. Under such a ruling, the boundary-line between strict pecuniary damages and those for solace would soon disappear.

The court erred upon this point both in admitting the evidence and modifying the instructions. It was good as asked.

Pausing here to review the instructions as asked on both sides, we see no substantial errors materially affecting defendant's rights in giving those asked by the plaintiff; in modifying the first and second, and in refusing the third, seventh, eighth and ninth of those asked by defendant. But we think defendant's case might have been prejudiced by the refusal to give the fourth, fifth, sixth and tenth of his instructions as asked, and by the modifications of the last.

Whether these errors were cured by the voluntary instructions afterwards given by the court, next requires consideration. They were long, and only their legal effect will be here set forth.

The court stated the general principles that railroads were responsible for the want of ordinary care and diligence of its em-

ployés in running the trains, except "in cases where the plaintiff is precluded from recovery by what the law calls contributory negligence." That to make the defense the negligence of the plaintiff must be ordinary and contribute to the injury, and the defendant must not have failed, after becoming aware of the danger, to use a degree of care proper to avert the injury. That the wife of the plaintiff was his agent, and her negligence would be imputable to him. The court then proceeded correctly but abstractly to define the different degrees of negligence as "slight," "ordinary" and "gross," and instructed the jury that in determining what facts made a specific degree in each particular case, they must carefully consider the thing to be taken care of, and the danger to be avoided, and "since, from the nature of their business, human life is always more or less endangered by the running of heavy trains over their road, the companies should take such precautions as the magnitude of the perils demands. It was left to the jury to say whether the employés of defendant were, under these rules, exercising ordinary care. If they were, the verdict should be for defendant. If not, and the jury should find that the injury resulted from their failure, they were advised that defendant would be liable for damages, and they should find accordingly, unless they should further find that the plaintiff, or his agents, failed in the exercise of ordinary care and prudence in the management of the child, and that such negligence contributed to produce the injury which resulted in death; in which case the plaintiff could not recover, unless they still further found that after discovering the danger, the defendant failed to exercise a proper degree of care and diligence to avoid the injury. In case of a verdict, they were instructed to assess damages in accordance with the special instructions given on that point.

It is very obvious that these additional instructions do not cure the error as to the measure of damages. They had been instructed specially that they might estimate any peculiar pecuniary value of the child's services attaching to the father by virtue of the relation.

For the rest they well define the law as far as they go, but they are not specially and hypothetically applied to the evidence in such a way as to enable a jury of practical men unused to legal reasoning clearly to understand their bearing. Besides, a review of the errors pointed out will show that they do not meet the particular points to which the defendants desired the minds of the jury to be directed in the instructions refused. Jurors are always men taken mostly from active avocations, and unused to apply general reasoning to the determination of details. We think the court erred in declaring the law as to damages and refusing the fourth, fifth and sixth instructions asked by defendant, and that the errors were not cured by the general instruction given on its own motion.

Reverse the judgment, and remand, etc.

See note, p. 559.

ETHERINGTON, adm'rx, respondent.,

v.

The P. P. and C. I. R. R. Co., appellant.

(*Advance Case, New York, Feb. 7, 1882.*)

In charging as to the contributory negligence of the father of plaintiff's intestate, the Court stated that the railroad being on a street, all persons had prima facie a right to be on the street for all lawful purposes, and that this fact ought to impose on the driver and conductor of a street car extraordinary vigilance in looking out for dangers and guarding against accidents and injuries to persons and things. *Held*, That the latter portion may be regarded as a mere passing remark made when the judge was not charging in reference to defendant's negligence.

The Court charged that if the driver was paying attention to his horses, and had control of them and the car, and was looking out and attending to his business, and did not see the child in time to stop the car before running over her, he was not guilty of negligence, and defendant not liable. *Held*, That this gave the jury a plain rule applicable to the facts of the case, and if defendant wished a fuller charge it should have requested it.

STEPHEN B. JACOBS, for respondent.

John H. Bergen for appellant.

EARL, J.—This action was brought against the defendant to recover damages for negligently causing the death of plaintiff's intestate. The intestate was an infant daughter of the plaintiff, two years old, and on the 24th day of June, 1880, was run over by one of the defendant's cars, in one of the public streets of the city of Brooklyn, and killed. The defendant claims that there was contributory negligence on the part of the father of the infant, and that it was free from negligence; and hence that the plaintiff should have been nonsuited at the trial. We have carefully looked into the evidence, and we are satisfied that upon the questions of negligence on both sides there was conflicting evidence to be submitted to the jury, and their decision thereon in favor of the plaintiff is conclusive upon us.

The case contains various exceptions, but two of which we deem it important particularly to notice. In the portion of his charge to the jury which related to the alleged contributory negligence on the part of the plaintiff, the father of the intestate, the judge said this: "You will recollect that this railroad was on the public street, and prima facie all persons have a right to be on the street for all lawful purposes, and the fact that this is a public street, and that all persons, old and young, adults and infants, have a right to be on the same, ought to impose upon the driver and conductor of a street car extraordinary vigilance in looking out for dangers, and guarding against accidents and injuries to persons and things."

To the portion of the charge within the parenthesis the counsel for the defendant excepted, and it is now claimed that the exception was well taken. It will be observed that the judge did not charge as a rule of law that the driver and conductor of a street car were bound to exercise extraordinary vigilance in looking out for dangers, and guarding against accidents and injuries, but that the facts to which he alluded ought to impose upon the driver and conductor of a street car such a degree of vigilance. This was a mere passing remark made when he was not charging, in reference to defendants' negligence. The attention of the judge was not in any way called to the word "extraordinary," which is now complained of." If that was the particular ground of complaint, it should have been specified. It may well be doubted whether the drivers and conductors of street cars are legally bound to exercise extraordinary vigilance. *Unger v. The Forty-second Street and Grand Street Ferry R. R. Co.*, 51 N. Y., 497. 1 *Thompson on Negligence*, 392, "We are also inclined to think that if any error was committed in the portion of the charge referred to, it was substantially cured by the charge as requested by the counsel for defendant, that "If the driver was paying attention to his horses, and had control of them and his car, and was looking out and attending to his business, and did not see the child in time to stop the car before running over it, then he was not guilty of negligence, and the company is not liable." That was the only rule which counsel for the defendant asked the court to lay down, and it gave the jury a plain rule applicable to the facts of the case which they must have understood, and by which we must assume they were guided in reaching their verdict. If the counsel for defendant desired a plainer rule or fuller charge in reference to defendant's negligence he should have requested it.

After the judge had charged that nothing could be recovered under the Act of 1847 by the plaintiff for injury to the feelings of the next of kin, but that the recovery must be merely to compensate them for the pecuniary injury, and that the plaintiff was entitled to recover the loss in money which the next of kin had sustained by the death of the child, he added a portion which defendant's counsel excepted to, as follows: "And yet the jury will see that there is no way to ascertain mathematically what that damage would be, it necessarily must be to a great extent speculative, and the only thing the legislature has done to help out a jury in this matter is to limit the amount beyond which they cannot go;" and he also charged as follows: "I don't know anything to control or fix the ground of your verdict in this way except it is your good judgment, and the statute which limits the recovery in all cases to five thousand dollars," and this was excepted to. He charged the jury that their verdict must represent the judgment of the jury as to what the death of the child had injured pecuniarily the next of

kin. He also charged, at the request of counsel for the defendant, that "if the jury find a verdict for the plaintiff at all, it can only find a verdict for the pecuniary injury resulting to the next of kin by the death of the child." "Nothing can be allowed for in damages which is not of a definite pecuniary value." "In estimating the damages, in case the jury should find a verdict for the plaintiff, they must take into account the age and sex of the deceased." "The jury, in estimating damages, if they find for the plaintiff, must take into account the social condition and standing of the next of kin of deceased, and the probability of their sustaining any pecuniary damage by her death." "The sufferings of the deceased person from the injuries, the grief and distress of her relatives, nor the loss of her society, cannot be taken into account in estimating damages."

Taking the whole charge upon the subject of damages, it was certainly fair and just to the defendant, and subject to no legal exception.

After considering all the exceptions, we are of the opinion no error was committed, and that the judgment should be affirmed, with costs.

All concurred.

See note, p. 559.

LOUISVILLE, NEW ALBANY AND CHICAGO R. R. Co.

v.

WILLIAM F. HEAD.

(*Advance Case, Indiana. April 1, 1882.*)

A person has a right to cross a railroad track anywhere within the bounds of the highway. A child, nine years old, while attempting to cross the track, caught his foot between the rails, and was injured by a train which was backing. He was not seen by the employees on the train in time to stop before reaching him. *Held*, that it was negligence on the part of railroad company in failing to keep a proper lookout.

APPEAL from the Lawrence Circuit court.

T. J. Jackson for appellant.

Reily and Voris for appellee.

BICKNELL, Com.—The appellee was an infant, he brought this suit by his next friend, against the appellant, to recover damages for the appellant's negligence.

On the day of the Presidential Election, in 1876, the appellee and other boys were about the polls in the town of Mitchell; it was between four and five o'clock in the afternoon. At that place

the appellant's road, running north and south, crossed Main street in the town of Mitchell, a street eighty feet wide, running east and west. A switch, running south-easterly to a freight house, also crosses Main street close to the main track of appellant's road, and the target of that switch, where the switch begins, is fifty or sixty feet north of the north line of Main street. An engine and some freight cars were standing on the main track, north of and close to the beginning of the switch; the engine was at the north end of the cars in Main street, alongside of the track; the appellant's had a "guard-rail;" the appellee, nine years old, undertook to cross the railway track in Main street, going north-eastwardly, and got his foot caught in the guard-rail, in Main street, about twenty feet south of the north line of the street. At that time, as the evidence tends to show, there was a switchman at the target, and a brakeman on the top of the cars, and when the boy found he was caught he cried for help, and immediately thereafter the train of cars began to back southward toward the boy, at the usual speed of a switching train.

The evidence further tends to show that several persons immediately cried out to the man at the switch, and gave signals to the brakeman on the top of the cars, by waving their hands and shouting, and that some of them ran to the boy to help him but could not get him loose, and that the train came on and was not stopped until it had reached the boy and cut his foot off, the bystanders holding his body out of the way.

The complaint was in two paragraphs, a demurrer to the first was sustained and a demurrer to the second was overruled. The answer was the general denial.

The issue was tried by a jury who failed to agree.

Afterward the appellant moved to dismiss the cause, on account of the insolvency of the appellee's next friend, and this motion was overruled.

The issue was again tried by another jury who failed to agree.

The issue was again tried by a third jury, to whom interrogations were propounded by both parties and submitted to the court and they returned a verdict for the plaintiff with one thousand dollars damages; they returned also the interrogatories and their answers thereto as follows:

First. Was there any effort made by those in charge of the train to stop the same until it was in the act of running over the foot of the plaintiff? Answer, no.

Second. Had the persons in charge of the train kept a proper lookout for persons or objects upon the track and for danger ahead, would they have discovered the plaintiff and known his situation, in time to stop their train before it reached or injured the plaintiff? Answer, yea.

Third. Was the plaintiff's foot fastened between the rails of

defendant's road, and so firmly held that he could not extricate the same and while in this condition was he run upon and injured by said train? Answer, yes.

Fourth. Did those in charge of the train keep a reasonably careful watch ahead for danger, while approaching the place where plaintiff was injured? Answer, no.

Fifth. Were there such signals and alarms given by plaintiff, or by plaintiff and others, as would reasonably have advised and made known to those in charge of the defendant's train, the condition of the plaintiff? Answer, yes.

The foregoing were the plaintiff's interrogatories.

The defendant's interrogatories were as follows:

1. Was the defendant's train, by which plaintiff was injured, stopped as soon as could reasonably be done after defendant's train hands were notified, or had knowledge, that the plaintiff was fastened to the track? Answer, yes.

2. When the plaintiff was injured, was the defendant guilty of any negligence which caused the injury complained of? Answer, yes.

3. Were the defendants signaled to stop the train so that those in charge of the train had knowledge of the same? Answer, yes.

3 $\frac{1}{2}$. Were signals given to those in charge of the train under such circumstances that they ought reasonably to have known that there was danger ahead? Answer, yes.

4. Did not the train, as soon as its hands were notified that there was a person on the track, immediately stop? Answer, no.

5. Do you find that the plaintiff contributes to the injury he received, by any negligent or careless conduct or act on his part? Answer, no.

6. Could the train have been stopped and the injury avoided, if the engineer had been notified of the danger, when the notice was first given by the plaintiff, or any other person, of his foot being fastened? Answer, yes.

7. Did the plaintiff follow the ordinary track for foot passengers to cross defendant's track at the time and place where said injury was sustained? Answer, no.

The appellant filed a motion for judgment in his favor on the answers of the jury to the interrogatories, which motion was overruled, the appellant's motion for a new trial was overruled, and her motion in arrest of judgment was also overruled; judgment was rendered on the verdict, and this appeal was taken, and the following is the assignment of errors:

1. The court erred in overruling the demurrer to the second paragraph of the complaint.

2. The court erred in refusing to dismiss said cause on account of the insolvency of James A. Head the next friend of the plaintiff.

3. The court erred in rejecting certain evidence in the cross-examination of William F. Head.

4. The court erred in ruling out certain evidence of John Head.

5. The court erred in refusing to give judgment for defendant on the special findings of the jury.

6. The court erred in overruling the motion for a new trial.

7. The court erred in overruling defendant's motion in arrest of judgment.

The second error assigned, presents no question for consideration because the matter therein referred to is not shown by any bill of exceptions.

The third and fourth errors assigned, present matters constituting cause for a new trial, but which, when assigned as error, present no question for decision. *Edwards v. Powell*, 74 Md. 294.

The first and seventh errors assigned, present the question: Is the second paragraph of the complaint sufficient? The complaint states that the appellant's railroad crosses Main street, a public street and highway in the town of Mitchell, Indiana, that in said street the appellant had a guard-rail, leaving a space of 2½ to 4 inches between the rails, that appellee was in the highway crossing the railroad track, and without any fault or negligence of his own, had his foot caught between the guard-rail and the main-rail, in said highway, and there fastened so that he could not get away, and that the appellant, by her servants, wrongfully, negligently, and carelessly, caused one of her locomotives, with a train of cars attached thereto, to run over the appellee, and that at the time this was done, the agents of the appellant in charge of said train, well knew that appellee was on said crossing, and well knew his helpless condition; that by reason of said negligence said train passed over the foot and leg of the appellee, and mangled and broke the same so that it had to be cut off, and that said injury was inflicted by said appellant without any fault or negligence of the appellee. The objections made to this complaint are that it fails to show how the guard-rail was kept, and fails to show that the appellee was upon the track at a point where he had a right to be, or that he was at the proper place for foot passengers to cross said railway track, and fails to show that the appellee was not careless in entering upon the track at the point where he did. But these objections cannot be sustained. The complaint avers that there was no fault or negligence in the appellee, and there is nothing in the complaint which shows any negligence in him. He had a right to cross the railway anywhere within the highway; if somebody, for convenience, had made a gravel walk for foot passengers, the appellee was not bound to use it; the averment that there was no such fault or negligence in the appellee is enough, unless it appears elsewhere in the complaint that there was negligence; nothing of that sort can be found in this complaint. In the case of the *J. M. & T. R. R. Co. v. Goldsmith*, 47 Ind. 45, it was

held that, between stations and public crossings, a railroad track belongs exclusively to the railroad company, and all persons who walk, ride, or drive thereon, are trespassers, and are subject to all the risks incident thereto, but that ruling is not applicable to the present case because here the appellee was crossing the railroad in a public street where he had a right to cross it. There was, therefore, no error in overruling the demurrer to the second paragraph of the complaint, nor in overruling the motive in arrest of judgment. The fifth error assigned presents the question whether the court erred in refusing to render judgment for the appellant, notwithstanding the general verdict for the appellee.

Such a motion can be granted in one case only and that is where the answers to the interrogatories, which answers are sometimes called "special findings of facts," are inconsistent with the general verdict. *Praeten*, Act. 337. The appellant's counsel urged, as a reason in support of this motion, that, "the special findings did not comprehend all the issues," but that matter is not applicable to answers of interrogatories. Such answers are not required to comprehend all the issues. But, the answers to the interrogatories in the case at bar, when taken together are not inconsistent with the verdict, they rather reinforce it. In answer to the first question of appellant the jury said that the defendant's train was stopped as soon as reasonably it could be, after the hands were notified, or had knowledge, that the plaintiff was fastened on the track. But this must be taken in connection with the answers to the fourth and sixth questions of the appellee, which show that those in charge of the train did not keep proper "watch ahead for danger when approaching the place where the boy was," and that if there had been such watch, the signals and alarm given by the bystanders would have been sufficient to notify the hands on the train. The answer to defendant's third interrogatory shows that the defendant was not signaled to stop the train so that those on the train had notice of it; this, too, must be taken in connection with the answers to the other interrogatories. If the train men had come rushing on, after having had actual notice, it would have been a wilful and wanton act, grossly inhuman and cruel, but the answers show that they came on because by their own negligence they failed to perceive, what with proper watch ahead for danger, they would have perceived.

The answer to the seventh interrogatory shows that the appellee was not on a foot walk which has been made across the railroad at the side of Main street; the appellant's counsel claim that the appellee was not where he ought to have been and was therefore a trespasser subject to all risks; but such a proposition cannot be maintained, the public had a right to cross the railroad anywhere in the public highway and are not out of place in so doing; it appears by the answer to the fifth interrogatory of the appellant that

the train was stationary at the time the appellee was crossing the railroad. The answers to the interrogatories are inconsistent with the verdict, and there was no error in overruling the appellant's motion for judgment non obstante.

Three reasons were alleged in the support of the motion for a new trial:

1. That the verdict is contrary to law.
2. That the verdict was brought about by undue influence.
3. That the verdict was contrary to the evidence.

The second of these reasons is not alluded to in the appellant's brief and is therefore regarded as waived. He claimed that the verdict was contrary to law, because the evidence shows negligence on the part of appellee, but the only negligence claimed is that the appellee was crossing the track where he had no right to cross it, and as already stated he had a right to cross it where he did. The other reason, alleged for a new trial, is that the verdict was contrary to the evidence. There was some evidence tending to support the verdict and where that is the case, the rule is that the court will not set aside a verdict upon a mere preponderance of the evidence against the verdict. *Lane v. Brown*, 22 Md. 239; *Butterfield v. Trittipio*, 67 Md. 342; *Randolph v. Lane*, 57 Md. 115; *Swales v. Sothard*, 64 Md. 557; *Fort Wayne v. Husselman*, 65 Md. 73; *Grant v. Westfall*, 57 Md. 121; *Watt v. DeHaven*, 55 Md. 128; *Cox v. The State*, 49 Md. 568; *Richardson v. Reed*, 35 Md. 356.

There was no error in overruling the motion for a new trial and there is no available error in the record. The judgment of the court below ought to be affirmed.

Per curiam: It is therefore ordered by the court, on the foregoing opinion, that the judgment of the court below be and is hereby in all things affirmed at the cost of the appellant.

See note, p. 559.

DERRENBACHER, RESPONDENT,

v.

LEHIGH VALLEY R. R. Co., APPELLANT.

(*Advance case, New York. Jan. 24, 1882.*)

Plaintiff was injured by the breaking of the rope of a derrick, while assisting in discharging ore from his boat to the defendant's cars. It did not appear that the derricks were used for defendant's benefit; that its officers had any control over them, or that it furnished the rope. It appeared that for a long time the derrick was under the control of M. & Co., who employed the men who discharged the cargo. *Held*, that defendant was not liable.

THIS action was brought to recover damages sustained by plaintiff through the alleged negligence of defendant.

Plaintiff was the master of a canal boat. About June 15, 1877, plaintiff was with his boat at Perth Amboy, with a cargo of iron, consigned and to be delivered to defendant. The complaint alleged that while the iron ore was being discharged from the boat into the cars of the defendant, by means of tubs and a derrick, in the use and control of defendant, plaintiff being there assisting in the discharge of the cargo, the rope, being old, defective and too small, broke, and the tub and contents were precipitated upon plaintiff, and he was injured thereby. The proof failed to show that any officer of defendant had control or charge of the pier at which the boat was moored, or over the derricks while they were used for the purpose of loading or unloading boats. There was no evidence that defendant had the derrick built, or that at the time they were used for his benefit.

It appeared that none of defendant's employés were engaged in the discharge of the vessel. There was no proof that any of the rope was furnished by defendant for the derrick, and it was proved for a long time prior to the accident the derrick in question was not in defendant's possession, but was under the control and charge of other parties, who used it for their own purposes.

George A. Strong, for appellant.

Edward H. Hobbs, for respondent.

MILLER, J.—The defendant seeks to avoid liability for the injuries sustained by the plaintiff upon the ground that it was affirmatively shown that it was not caused by the defendant's negligence, and that it was in no way connected with the accident. The plaintiff claims that there was proof upon the trial that the defendant occupied the pier with the railroad track on which its cars ran, and used the same, that the derricks were in common use; that the persons employed in unloading the boats were furnished by defendant; that the derrick in question was in part constructed by the defendant, that it furnished and put in the rope which was in use for a number of years, and that it was improperly constructed, the rope being too small and having become chafed and worn. In regard to the occupation or ownership of the pier, the evidence showed that the pier was constructed by the Easton and Amboy R. R. Co.; that this road had not been merged in the Lehigh Road, and that the Lehigh Valley R. R. Co. run their cars over the track of the Easton and Amboy R. R. Co. There was also proof that the cargoes had been taken to the boats from the cars and from the cars to the boats by outside contracting parties, and that they were hoisted out by the derricks on the pier. The proof failed to show that any officer of the Lehigh Valley R. R. Co. had control or charge over the pier or over the derricks while they were used for the purposes of loading or unloading. The plaintiff upon his direct examination testified that the accident

occurred at the dock of the Lehigh Valley R. R. Co.; but upon his cross-examination he says he was consigned there, and was told so by the shipper, that he never saw any papers showing that the company owned the dock, that he did not know who the land belonged to, but knew said railroad company, and they did discharge boats there. That the shipper told him that he had to go to the Lehigh Valley Co. at Perth Amboy, New Jersey. Another witness called by the plaintiff, Coddington, first testified that he was employed on the freight wharf at Perth Amboy, for the company, but he afterwards swore that he was working for the Easton and Amboy R. R. Co.; that he was working under Mr. Donnelly's directions, and whether he was working for the Lehigh Valley Co. or not he did not know, very probably for the Lehigh Valley Co., and that he only knew presumably, and had no contract with that company. To a question afterwards put, "You knew what company he was working for?" He answers, "Yea, sir; the Lehigh Valley Railroad Company;" and further states, so far as he knew, Mr. Donnelly works for the same company, and at any rate he received instructions from him. It is proved, however, by Mr. Packer, very positively, that Donnelly was not employed by the Lehigh Valley Co. The witness, Coddington, also testified that a Mr. Andy, who was now working for the company, did some work on those wharfs, and he saw him to work on derricks, possibly three years ago. The evidence last referred to certainly does not establish that the defendant had the derricks built, or that it was either the owner or in possession of the dock or of the derricks, or that at the time they were used for its benefit to such an extent as to render it liable for damages occasioned by the accident. The proof as to the use of the track which was laid by the Easton and Amboy R. R. Co. does not of itself establish a liability on account of such use, as it is not unusual for different railroad companies to use the tracks which belong to others in the prosecution of their business.

Nor is the evidence to which reference has been had sufficient to establish that the persons employed in taking out the iron ore from the boat and putting it in the barge were furnished by the defendant. On the contrary, Coddington, the witness called by the plaintiff, whose testimony has already to some extent been considered, testifies that Owen Scallon, who was employed by Thomas J. Maloney & Co., superintended the unloading of that particular cargo. There this firm carried on business on commission; that the ore came from the Bethlehem Iron Co. in the cars of Maloney & Co.; and that their stevedores unloaded it, and the company had nothing to do with it. Whether Maloney & Co. were paid by the defendant the witness does not know, and there is no proof of this fact. This firm did the unloading of the cargoes which were consigned to them or to their care by the Bethlehem Iron Co., and were in charge on that day, and when the accident occurred and the

day before, and were engaged in discharging this vessel. It thus appears that none of the defendant's employes were employed in the discharge of the vessel, and that it was done under the charge of Maloney & Co. In this connection it should not be overlooked that the shipping bill introduced in evidence, admitted by plaintiff to be signed by him, and his signature identified by another witness, shows that the cargo was consigned to the Bethlehem Iron Co., care of J. T. Maloney & Co. The plaintiff also testifies that he left Port Henry about the date mentioned in the shipping bill, and another witness swears that the first name on the shipping bill was the Bethlehem Iron Co., and the bill itself was introduced in evidence upon the trial, and establishes this fact beyond any dispute. As the evidence stands, it is undisputed that the cargo was consigned to the Bethlehem Iron Co., to the care of J. T. Mahoney & Co., and the defendant was not such consignee, and hence there was no question of fact as to that point.

In regard to the purchasing and putting in all or any of the rope which had been for years used in equipping the derrick, the only evidence on the subject is the testimony of Coddington. This witness swears that he purchased the rope by the direction and under the instructions of Mr. Donnelly; that he did not know that he bought it for the Lehigh Valley Road; although he had testified at first that he was employed by the defendant. It also appears from his testimony that he was working for the Easton and Amboy Co. and under Donnelly's directions, and whether Donnelly was so working he did not know; and the proof was distinct and unequivocal that Donnelly was not in defendant's employment. A careful examination of the testimony evinces that there was in fact no proof that any rope was furnished by the defendant for the derricks, and it therefore could not be held liable upon any such ground.

The defendant was not proved to have had anything to do with the construction of the derrick. One witness testifies, as has been stated, that some one in the defendant's employment worked on the derricks several years ago; but the testimony is very vague and uncertain, as we have seen, and does not establish that defendant constructed the derrick, no proof that he did so at the request or by the direction of the defendant, and it was not established by any sufficient evidence that such was the fact. As it was not shown that the defendant was the owner or in possession of the derrick in question at the time, it is quite clear that it was not responsible for its construction.

In view of the testimony it is difficult to see how the defendant could be made liable for the result of the accident. The fact that at the time of the accident and for a long time prior thereto, as the testimony shows, the derrick in question was not in the defendant's possession, and was under the control and in charge of

other parties using it for their own purposes, is an insuperable obstacle in sustaining the recovery of the plaintiff. The men who discharged the cargo were employed by Maloney & Co., and without proof the legal presumption is that Maloney & Co. were acting for themselves and without regard to the defendant. *Hinds v. Burton*, 25 N. Y. 544, 548. In fact the evidence shows that such was the case, and it therefore devolved on the plaintiff to establish to the contrary. The defendant was not liable to an independent contractor in the absence of a contract to keep the derrick in repair. *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 186. The principle decided in this case is not affected by the decision in the same case in 72 N. Y. 607, as in the latter the plaintiff's evidence tended to show that the defendant agreed to furnish the derricks and keep the same in repair, and there is no such proof in the case at bar.

The points we have considered were raised on the motion to dismiss the complaint and on some of the requests to charge, and we think that the Court erred in denying the motion and in refusing the requests made in this respect for the reason stated.

There are other questions in the case, but it is not necessary to consider them in view of the conclusion already reached.

The judgment should be reversed and a new trial granted, with costs, to abide the event.

All concur.

GALVESTON, H. AND S. A. R. R. Co.

v.

DELAHUNTY.

(53 *Texas Reports*, 206. March 26, 1880.)

A railway company is not liable to its employes as an insurer for injuries caused by defective implements it may furnish them, if all proper precautions be taken to see that they are reasonably safe and strong.

Negligence in a corporation in the performance of its duty to its employes to furnish them safe and suitable implements, is a fact to be established for the jury. But when the injury complained of is traced to defective implements furnished by the master, whether any further evidence of negligence is necessary, until it is shown by the master that reasonable care was exercised in their selection, *quære*?

To require a reversal of a judgment in the supreme court because of error in a charge, it must be a material error, to the prejudice of the party complaining of it. When it is manifest that an erroneous charge operated no injury, or where no other conclusion than that arrived at by the jury can be legitimately deduced from the facts, the supreme court will refuse to reverse the judgment.

A party who made no complaint of a charge at the trial, but apparently

acquiesced in it, should be required to make a more conclusive showing that his rights had been prejudiced by it, than would be required of one who exercised vigilance in protecting his interests, and objected at the right time.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The opinion states the facts.

E. P. Hill for appellant.

I. The charges complained of by appellant put the employer in the relation of an insurer or guarantor of the servant against injury, whereas the true and universally recognized principle is, that he is bound only to exercise reasonable and ordinary care in providing materials to do the work required, and can be held liable to the servant only when negligence can be properly imputed to him in failing to exercise such care. No such rule of law as that announced in the charges is applied in the case even of injury to passengers. (Cooley on Torts, note 1, p. 557.) The charges complained of are not qualified or corrected by the subsequent charge quoted by appellee's counsel, as follows: "If the proof satisfy you that defendant furnished sound rope, or rope reasonably fit for the work it was applied to, find for defendant; or, if plaintiff had equal opportunity to ascertain the condition of soundness or unsoundness of the rope that defendant had, then plaintiff cannot recover." The first clause of this charge, so far from qualifying or correcting the error of the others, persists therein, and, taken in connection with them, holds the defendant as bound absolutely and at all events to furnish a sound rope. The second clause relates entirely to a distinct issue in the case, viz.: whether plaintiff (appellee) had equal means of knowing, or did know, the condition of the rope.

II. The complaint of appellant is not that the charges were "indefinite or incomplete," but that the law as therein stated by the court is positive error.

The rule is well settled that where there is no error in the charge as given, but the complaint is that it was not sufficiently comprehensive, or that the law of the case was not fully given, or did not embrace the whole law applicable to the case, then the "indefinite or incomplete" matter should be supplied by asking instructions, but it is otherwise where, as in this case, the charge given is erroneous. Appellant's third assignment of error is, "The court erred in overruling the motion for a new trial," and the grounds of the motion are: "First, because the verdict of the jury is contrary to the law and evidence. Second, because the verdict of the jury is contrary to the charge of the court, as applied to the facts in evidence, and because the charge is erroneous."

III. This case was tried and appealed before the adoption of the new rules by this court, and however it may be now, an assignment "that the verdict is contrary to the law and evidence" was always,

before the adoption of the new rules, regarded and treated as sufficient. In case of *Flanagan v. Boggess*, 46 Tex. 334, cited by counsel for appellee, the assignment was "that the court erred in its charge." So in *Trammell v. McDade*, 29 Tex. 362, an assignment of that character was said to be an imperfect compliance with the law, but in the same case an assignment "that the verdict is contrary to the law and evidence" was treated and considered by the court as sufficient.

M. Looscan for appellee.

I. The charges of the court, as assigned as error by appellant, contain correct propositions of law. *H. and T. C. R. W. Co. v. C. J. Dunham*, 49 Tex. 181; *I. and G. N. R. R. Co. v. T. Doyle*, 49 Tex. 190; *Wood's Master and Servant*, secs. 377 and 406; *Perry v. Rickets*, 55 Ill. 234; *Chicago v. Swett*, 45 Ill. 201; *Lalor v. C. R. R. Co.*, 52 Ill., 401; *C. R. R. Co. v. Jackson*, 55 Ill. 492; *C. R. R. Co. v. Harney*, 28 Ind. 28; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Coombs v. New Bedford Cord Co.*, 102 Mass. 572; *Quaid v. Cornwall et al.*, 13 Bush (Ky.) 601; *Leonard v. Collins*, 70 N. Y. 90; *Boree Stone Co. v. Kraft*, 31 Ohio St. 287; *Hough v. Texas Pacific R. R. Co.*, Central L. J., Feb. 6, 1880.

II. If that portion of the charge, specified in first and second assignment, be objectionable, the same was qualified and corrected by a subsequent portion (2d subdivision) of the charge, and appellant sustained no injury thereby. The court charged: "If the proof satisfy you that defendant furnished sound rope, or rope reasonably fit for the work it was applied to, find for defendant; or, if plaintiff had equal opportunity to ascertain the condition of soundness or unsoundness of the rope that defendant had, then plaintiff cannot recover."

III. If the charge as given was too indefinite or incomplete (which we deny), defendant should have excepted to the charge, and asked for additional charges. *Hall v. O'Malley*, 49 Tex. 73; *Johnson v. Blount*, 48 Tex. 43.

GOULD, J.—This is a suit brought to the July term, 1875, of the district court of Harris County, by Pat. Delahunty, appellee, against the Galveston, Harrisburg and San Antonio R. R. Co., appellant, for damages because of personal injuries alleged to have been sustained by him, without any fault on his part, while in the employ of appellant, resulting from the supplying to him by appellant of unsuitable and unsafe machinery or appliances to work with, to wit: a rotten or unsound rope, the unsafe or defective condition of which rope he did not know, nor had he any means whatever of knowing; that appellant was guilty of gross and wilful negligence in furnishing him with such insufficient appliances; that it knew of such defect, or could have known of it by the exercise of ordinary care; and from subjecting appellee to dangerous risks not incident to his employment.

The leading or principal facts showing the circumstances under which the injury was received may be thus stated :

On the 21st of February, 1875, Patrick Delahunty, who was in the employ of the Galveston, Harrisburg and San Antonio R. R. Co. as a section foreman, was, in the discharge of his duties, with the road-master (Norway) and other employes, engaged in replacing upon the track a box-car, which had run off the day previous. They set a couple of skids under the car, with the ends resting on the rails ; then fixed a rope around the car, and using a block and fall, or tackle, with one end of the rope attached to the stump of a tree and the other to a flat car attached to an engine, which furnished the motive power, had "raised the car up gradually on the under side until it brought it on a level," and "the upper side had been brought up until it just leaned over on its edge." In this operation over one hundred feet of the rope had been pulled out. With the car in this position, the road-master, who appears to have been directing the work, put Delahunty and others to level a place under the car for crib work, to block it up, and while doing this, the rope broke and the car came down on Delahunty, and he was severely injured. The rope was one previously used in digging wells, and was used on this occasion by direction of the road-master. There was testimony tending to show that it was worn, and not very good. It was in evidence that it was customary in raising cars to use a derrick, but that on defendant's road they always used block and tackle. No evidence was introduced on behalf of defendant, and for the purposes of this opinion, it is not necessary to state the evidence further.

The following is the charge as a whole :

"1. That it is the duty of an employer to provide sound material with which to do the work required of the employe, and the failure to provide such, when an injury results from supplying unsound material, renders the employer liable in damages to the employe injured. If the proof satisfy you that plaintiff was in the employ of defendant, and that defendant furnished and supplied plaintiff a rope for the work required of plaintiff, which was rotten or unsound, and if the accident was the direct result of using the rope, then find for plaintiff such actual pecuniary damages as plaintiff has established, considering the nature of the injuries received.

"2. If the proof satisfy you that defendant furnished sound rope, or rope reasonably fit for the work it was applied to, find for defendant. Or, if plaintiff had equal opportunity to ascertain the condition of soundness or unsoundness of the rope that defendant had, then plaintiff cannot recover.

"3. Punitive damages cannot be allowed in this case, but if liable under the law and evidence, it is liable for actual compensatory damages, and in estimating damages, the loss of time and the

permanent character of the injuries, if of that nature, are to be considered."

No charges were asked on behalf of defendant, nor does it otherwise appear that he in any manner called the attention of the court to the part of the charge now objected to. In his motion for new trial he complains that the charge was erroneous, but does not specify in what particular. In this court he assigns error, embracing the entire first paragraph of the charge, and complains that it is erroneous because "it puts the employer in the relation of an insurer or guarantor of the servant against injury, whereas the true and universally recognized principle is that he is bound only to exercise reasonable and ordinary care in providing materials to do the work required, and can be held liable to the servant only when negligence can be properly imputed to him in failing to exercise such care."

The corporation is certainly not liable to its employés as an insurer against injuries, nor for injuries caused by defective implements, if all proper precautions were taken to see that they were reasonably safe and strong. *R. R. Co. v. Doyle*, 47 Tex. 198; *R. R. Co. v. Dunham*, 49 Tex. 181; *Cooley on Torts*, 557.

Negligence in the corporation in the performance of its duty to its employés to furnish them safe and suitable implements, is a fact to be established. *Cooley on Torts*, ch. 21.

But if the injury to an employé be traced to defective implements furnished by the master, it is far from clear that any further evidence of negligence is necessary, until the master makes some showing that reasonable care had been taken in their selection. *Cooley on Torts*, 661-4. See, also, *Piggot v. Eastern Counties Ry. Co.*, 54 Eng. Com. Law, 229.

Negligence, however, is ordinarily a question of fact for the jury, and we are not prepared to say that the court did not err in its charge in withdrawing that issue from the jury. *T. & P. W. Co. v. Murphy*, 46 Tex. 356.

But to require a reversal in this court because of error in the charge, it must be a material error to the prejudice of the party complaining of it. *Id.*, 368.

Where it is manifest that the erroneous charge operated no injury, as where no other conclusion than that arrived at by the jury can be legitimately deduced from the facts, this court will refuse to reverse the judgment. *McLane v. Rogers*, 42 Tex. 220; *Mercer v. Hill*, 2 Tex. 287; *Lea v. Hernandez*, 10 Tex. 137; *Howell v. Nutt*, 12 Tex. 266; *Hubby v. Stokes*, 22 Tex. 220; *Sypert v. McGowen*, 28 Tex. 635; *Allbright v. Corley*, 40 Tex. 112; *Carter v. Eames*, 44 Tex. 548; *Williams v. Conger*, 49 Tex. 622; *Erwin v. Bowman*, 51 Tex. 514.

Such is the rule, although the appellant may have done all in his power at the trial to prevent the court from committing the

error, and to have it corrected in that court. It would seem reasonable that a party who made no complaint of the charge at the trial, but apparently acquiesced in the law as given in the charge by the court, should be required to make a stronger showing that the charge operated to his prejudice, than is required of one who objected at the right time. *Hollinsworth v. Holhousen*, 17 Tex. 47. But be that as it may, our opinion is, that under the evidence the jury could have come to no other conclusion than that the injury, if it was the result of using unsound rope furnished by defendant, was caused by the negligence of defendant. The defendant introduced no evidence whatever tending to show what precautions, if any, were taken by it to secure good and safe appliances for the use of its employes. The evidence fails to point to any diligence exercised by the company in the discharge of its duty. If the jury found the injury to be the direct result of a defective rope furnished by defendant, we do not see, under the evidence, that they could have found that there was no negligence in requiring of its employes such work with such appliances. If there was error in the charge, it did not operate to appellant's prejudice. In regard to other errors assigned, it is believed to be unnecessary to say more than that we find none justifying a reversal of the judgment.

The judgment is affirmed.

Affirmed.

See note, vol. 5, p. 504.

NASHVILLE, CHATTANOOGA AND ST. LOUIS R. R. Co.

v.

WILLIAM F. WHEELER.

(*Advance Case, Tennessee. January 7, 1882.*)

Plaintiff was a brakeman in the service of the defendant railroad company, and while coupling cars was injured. *Held*, that he assumed the risks and dangers incident to the service, and could not recover compensation for any accidental injury: *Held*, further that the engineer and brakeman, operating a train, are fellow servants.

EAST and TOGG, for plaintiff in error.

Bethe and Williams, contra.

McFARLAND, J.—Wheeler, while employed as brakeman for the railroad company, was attempting to “couple” the cars of a freight train on which he was engaged and in doing so his hand was caught, causing the loss of one of his fingers and the permanent injury of another.

For this injury he has recovered in this action, \$1,250 damages. From this judgment the railroad company has appealed in error. The circuit judge said to the jury that the plaintiff placed his right of recovery upon two grounds: 1st. That the company was liable for the injury, because of its failure to provide the safer and more improved mode of coupling the cars. 2d. That in backing the cars to effect the coupling, the engineer carelessly and negligently backed the train too fast. The declaration it is true, contains other allegation of negligence, but the questions made by the proof were as stated by the circuit judge.

Upon this first question the proof showed that there were two kinds of "drawheads" in use, by means of which freight cars were "coupled;" one known as the "open drawhead" the other the "solid drawhead." The former was the older, the latter was the improved and safer device for connecting the cars. The two cars being coupled had the "open drawhead," but the proof tended to show that the plaintiff knew that both kinds were in use; and continued in his occupation without objection.

The judge charged the jury in substance, that if the plaintiff knew that both styles of "drawheads" were in use, the difference being easily apparent to an ordinary observer, and continued to act as brakeman without objection, he could not recover. This was in accordance with the holding of this court, in the case of *Hodges v. the East Tennessee, Va. and Ga. R. R. Co.* and other companies, and was as full and distinct in favor of the defendant, as could have been desired, and from the proof in this record it is not probable that the recovery was upon this ground.

Upon the other ground the proof showed that the accident occurred in the night, in the attempt to couple two portions of a freight that had broken apart. The conductor directed that the train be "coupled up," but did not remain to superintend it himself, going at the time into the depot to attend to other business. The proof shows that the engineer backed the part of the train attached to the engine, to within 18 or 24 inches of the car to which the coupling was to be made and then came to a stop. The plaintiff was at the time standing between the cars ready to make the coupling. The engineer could not see the portion of the car or their distance apart; he was, however, signaled by another brakeman to back further, and the brakeman says he gave him the proper signal, indicating that he was to back slowly and but a short distance, but by applying too much steam the train ran suddenly and rapidly back, and the plaintiff's fingers were caught between the bumpers. If the train had been backed slowly, the accident would not have occurred. In brief, there is ample evidence to justify the jury in finding that the injury resulted from the want of care, or negligence of the engineer. This under the course of decision in this state, depends upon the question whether the en-

gineer was the "superior" of the plaintiff in such a sense as that the latter was under the authority of the powers and acting under his order in the particular service, or were they fellow-servants employed in a common employment. The general rule of this common law is, that a master is not responsible to the servant for injury resulting from the negligence of a fellow-servant engaged in a common employment, where there has been due care in the selection and employment of the fellow-servants in a common employment. The more recent decision of this court have made exception to this rule, in two respects: 1st. When the two servants are engaged in different departments of service, as for instance, the engineer or hand upon a passenger train, and a section-hand at work on the track. *Carrol v. R. R. Co.*, 6 Heiskell. This exception does not apply in the present case, for it can hardly be said that the different employes constituting "the crew" of a train, are not engaged in the same department of service; they are, no doubt, "fellow-servants."

But the other exception is, where one servant is the immediate superior of the other, with authority to order and direct the latter in his duties, as for instance, a squad of hands engaged in repairing the track under the authority of a "Section-boss." In such case it has been held that if one of the hands is injured by the negligence of the "Section-boss," the company is liable. *R. R. Co. v. Bottley*, 9 Heisk, 866. Hence, as we have stated, the question in this case was whether the plaintiff as brakeman and engineer, occupied towards each other the relation of "inferior" and "superior" in the sense indicated. The practical application of this rule involves some difficulty.

It is no doubt, in the first instance, a question of fact for the jury; and we take it to have been the purpose of the judge to instruct the jury that the result of the case in this aspect, should depend upon their determination of this question of fact. While he does in terms submit to the jury the question, whether the engineer was or was not the superior of the plaintiff; yet the charge as a whole on this question, is somewhat ambiguous. The charge is of that character that the court might if it applied to a doubtful question, reverse because of its ambiguity and tendency to mislead. The more important question, however, is whether the facts do or do not sustain the conclusion that the engineer was the superior, or the plaintiff, in the sense we are considering. There is really little or no conflict as to the facts. The witnesses differ in their conclusions or opinions upon the question, but their statement of facts are substantially the same. The engineer is required to have superior capacity and skill in his art, to acquire which requires long service. He receives higher wages than the brakeman, and in fact, higher wages than the conductor or any employé on the train. He has charge of the engine and manages and operates it,

and while in motion, his position is on the engine. The brakemen are not required to be men of skill, but a common laborer may, with a little practice, become a brakeman. They are distributed along the train, and it is their duty to operate the brakes, usually acting upon signals given by the engineer, they also give and communicate signals to the engineer as to moving or stopping the train, they put off and take on freight and wood, and perform other menial services. They receive the lowest rate of wages, and in a general sense are regarded as inferior to the engineer. The conductor has charge of the train and it moves in accordance with his order, but in many movements the engineer and brakeman act in accordance with general regulations, and a general knowledge of their duties and without any special order. The conductor and engineer are both said to be in charge of the train and responsible for its movements.

The conductor, engineer, fireman, and brakeman, constitute the entire crew of a freight train. In coupling cars, or making up trains, the engineer acts upon signals communicated to him, either by the conductor or brakeman; but generally he gives no order in regard thereto. These are substantially the facts as deposed to by the witnesses. Now the question is, whether or not, upon these facts, the engineer was the superior in such a sense, as under our rule to make the company responsible for the results of his negligence, to the brakeman, when engaged in the character of service disclosed in this case. Suppose the jury had found, as a special verdict, the facts above set forth. The principle upon which our rule is based, to wit, that the master will be liable for injuries resulting to one servant from the negligence of another servant, who is the immediate superior of the first, is based not upon the idea of the relative rank of the two servants, or their general superiority of the one in position, intelligence, or skill, or in the wages received; but upon the ground that the one is placed under the order and direction of the other, and required to submit to and obey such order in the performance of his duties. So that the "inferior" is placed in the position of servant to the superior. In such cases the superior is held to represent the master. In this view we are of opinion that the facts do not show that the engineer was, in the sense we are considering, the superior of the plaintiff in this instance. They were engaged in a common service, each performing his particular part. They may both be said to have been acting under the order, either expressed or implied of the conductor. But the engineer did not assume any supervision of the work, or give any order in regard to it; and the plaintiff cannot, in any fair sense, be said to have been acting in this particular matter under the order, either express or implied of the engineer; and the mere fact that the engineer was the superior of the plaintiff in position, skill, intelligence, and pay, does not change the result. The over-

whelming weight of authority will be found to support this conclusion. We have had occasion recently to examine these authorities in the case of the Knoxville Iron Co. v. Dobson not yet reported. Even the exception to the general rule in regard to fellow-servants which we have established, as above indicated is opposed to the large number of cases. We are satisfied, however, with our own rulings and adhere to them; but we do not feel authorized to extend the exception to include the present case. To do so would be in effect to abrogate the general common law rule altogether. A rule which has been long established and with the exception indicated universally adhered to.

Where there has been no want of care upon the part of the master in selecting and employing a servant, or in failing to discharge him after he is known to be incompetent a fellow-servant in a common employment, and in the same department of service, not acting under the order, or in subjection to the first, has no remedy for injuries resulting from his negligence. If this be a hard rule to apply to these unfortunate men who, perhaps, for inadequate wages, perform so much ordinary and perilous labor, and so many of whom are injured, it is still a rule, too well established, to be overthrown by the court. If they should have other protection by law, the law making power must provide the remedy. It is well settled that, in engaging in this employment, they take upon themselves all the ordinary risks attending it. One of these risks is that "fellow-servants," although in general careful and skilful, will some time be negligent. And, in order to recover, the plaintiff must show that his injury resulted from the carelessness, or want of skill of some one who, in the particular matter, stands in the place of the master. Of course in some cases a railroad company may be held liable to a brakeman for the negligence of an engineer, as in fact acting under the order of the latter, we do not mean to hold, that the relation of superior and inferior may not in some cases exist between, only that it did not in this case, so far as the record shows.

Judgment reversed.

See note, vol. 5, p. 504.

LITTLE ROCK AND FORT SMITH R. R. Co.

v.

DUFFEY.

(85 Arkansas Reports, 602. November Term, 1880.)

When one enters into the employ of another, he assumes and is presumed to have contracted with reference to all the risks and hazards ordinarily inci-

dent to the employment; and the master is not liable to him for injuries resulting from an accident which he might not, by ordinary care and diligence, have prevented. The same rule applies, also, to perils and risks not incident to the service, of which the servant has notice, unless he has been induced to accept the service by the promise of the master to remove the cause, and he has failed to do so.

The master is not liable for an injury to his servant, caused by the negligence of a fellow-servant engaged in the same business, if there be no negligence in the appointment of the latter, or in his retention after notice of his incompetency.

The question of negligence is a mixed one of law and fact, in the determination of which it is to be considered whether an act has been done or omitted, and, also, whether the doing or omission of it was a breach of legal duty.

There is no implied warranty on the part of a master that the tools furnished his servant are sound and fit for the purposes intended. He is only bound to use proper care in providing them.

That a master might have known by the use of ordinary care and diligence, that a tool furnished his servant for use was defective, is not sufficient to make him liable for the injury resulting from its use, irrespective of any probability of harm or danger in using it.

APPEAL from Faulkner Circuit Court.

Clark & Williams, for appellant.

S. A. Cockrill, for appellee.

HARRISON, J.—This was an action by the appellee, against the appellant, to recover damages for an injury received by the former while in the latter's employ. The complaint alleged that the plaintiff, while in the defendant's employ, and working on its track, had, through the defendant's negligence, an eye put out by the breaking of a defective and unsafe spike-maul, which was at the time known to the defendant to be defective and unsafe.

The defendant denied the alleged negligence, or that the maul was defective or unsafe, or if it was, that it had any knowledge of the fact, and averred that the accident happened by the plaintiff's and his fellow-servants' improper and negligent use of the maul, the condition of which, if defective and unsafe, was at the time known to him.

The plaintiff, for himself, testified that he was, when the accident happened, in the employ of the defendant and working with other hands, under the direction of Mr. Darron, the foreman or section-boss, on its track, raising ties and taking out old and putting in new ones. That while so engaged, a spike, in being driven, bent in under the rail, when, to force it out, one of the spikers put the small end of his spike-maul between the spike and the rail, upon the face of which another struck with his maul, and, while so striking, a small piece of steel flew off and struck him, the witness and plaintiff, in the eye, and which entered the ball and put out and destroyed the eye. He was, when struck by the piece of steel, holding up the tie with a claw-bar, outside of the track, using a block of wood as a fulcrum, and sitting on the end of the claw-bar,

outside of the track. He supposed, when hurt, that it was by a piece of the spike, and did not know, until the next day, that it was by a piece of steel from the face of the maul. Upon examining the maul (which of the two does not appear), he found the face of it rounded and badly battered, and the rim of the face shivered, and two or three pieces out of it. He believed that the accident was caused by the striking of the faces of the mauls together in the attempt to force the spike out from under the rail, and that it would not have happened if the rim had not been shivered. He had not, himself, used the maul, and had not before noticed its condition, except that it had a split handle. It appertained to his part of the work to draw crooked spikes, when so directed; but the foreman, who was standing about twenty feet behind him, looking on, and had plenty of time after the commencement of the striking and before the accident, to have stepped to the strikers, gave no such directions. Darron, the foreman, hired and discharged hands, and it was his duty to give direction to those under him. He had never ordered the men not to strike the faces of the mauls together. He had worked on railroads twelve or fourteen years, and was three years of the time a foreman, and he could then get employment as a foreman but for the loss of his eye. He was receiving, when hurt, he said, \$1.10 a day. He further testified as to the expenses attending his cure, which part of his testimony need not be stated.

Thomas Conley, a witness also for the plaintiff, testified that he was, when the plaintiff was hurt, working on the track tamping, about fifty yards from him, and after the accident he was sent by Darron to take his place. He saw the maul about three days after the accident. It had a shivered handle, wound with wire, and the face of it was worn round and its edge battered, and pieces of steel broken off. He had, he said, been a laborer on railroads for about sixteen years, working principally on grading. Tools are furnished the hands by the foreman, whose duty it is to have the damaged ones repaired, or to get new ones in their place. It was the business of the foreman to know the condition of the maul. It was still in use when he left the road at the end of the month.

And Charles Watson, another witness for the plaintiff, testified that he was a common laborer, and he had been working on the road under Darron about two weeks when the accident occurred, and he heard of it about a week after. He saw a maul, with a split handle, wound with wire, the face of which was globular and likely to throw a spike out, and was flinched around the edges. He had had some experience in spiking. Such a maul was more likely to splinter off than one with a smooth face. It was Darron's duty to see to the tools of the trackmen. The maul was used after the accident, and as long as he remained on the road.

D. W. Darron testified for the defendant, that he was section-

boss, or foreman, in charge of the hands with whom the plaintiff was working when the accident occurred, and had six men, three of whom were tamping. He was about ninety feet from the plaintiff, and did not see the men. He heard an exclamation by the plaintiff, and when he saw that he had left his place, he sent a man to take it, and went to where he was, and after seeing him, sent for a physician. The physician saying a piece of steel had entered the eye, he examined the maul, and discovered that a small piece of steel, so small as hardly to be perceived, had chipped off of it. He had been careful in the selection and looking after the tools, and they were as good as are usually used and as could be bought in the market. He saw them every day, and he had often examined the mauls and knew of no real defect in any of them. His attention had once been called to the handle of a maul that had split, and he had fixed it by mending it with wire, and it was then as good as ever. He then noticed that the face of the maul was chipped a little, but the use of the maul was not materially impaired by it, and such chipping, in his opinion, did not render a maul dangerous. He had seen mauls used as those were when the accident happened, occasionally for fifteen or twenty years, and had never heard of such an accident before. The face of the maul is of tempered steel, and will become abraded by use, and if struck on surfaces of equal hardness, will splinter or chip, and is liable to do so, also, from driving the spikes, but no more liable in either case after it has been some time in use than when new. The chipping is vertical, leaving the face not so large, but as smooth as ever. If one of these corners were struck upon a maul or spike, it would be more likely to splinter than if two faces were struck together. A spike in driving sometimes bends under the rail, when, to prize it out, the men will sometimes put the small end of a maul between the rail and it, and drive the maul with another maul, striking the two faces together. He had often ordered them to draw the spike, which it was the nipper's place to do. The plaintiff was nipper when the accident occurred. He considered a maul good as long as it answered its purpose and drove a spike straight. He had, when necessary, made requisition for tools, and they were always furnished. The wages of a foreman, he said, was \$50 a month.

And Thomas Hurley, another witness for the defendant, testified that he had been four or five years roadmaster on the defendant's road, and that the tools furnished the hands were generally as good as he had ever seen on any road. That whenever a foreman asked for tools they were furnished, and when needing repair he sent them to the shop, and when sent out from it they were in good order.

The court gave the jury four instructions for the plaintiff, each of which was objected to by the defendant, and eleven were asked by the defendant, all of which, except the tenth, were refused.

Those given for the plaintiff were as follows :

1. The jury are instructed that it was the duty of the defendant railroad to use all reasonable precautions for the safety of the men working for them, by giving them suitable materials and tools to work with, and by keeping them in a condition not to endanger their safety beyond what was ordinarily incident to the use of such tools when in proper repair.

2. The jury are instructed that if they find that the plaintiff was injured by reason of a defective or insecure spike-maul, used at the time of the injury by an employé of the defendant railroad company in discharge of his duty, while he, the plaintiff, was in discharge of his duty, and that the defendant railroad company, through its agents, knew that said maul was defective, or insecure, or might have known it by the use of ordinary care or diligence, they must find for plaintiff, unless they also find that plaintiff was also in fault at the time of the accident, and by reason of his fault contributed to the injury ; or that he knew the maul was defective, or ought, by ordinary care, to have known it, and that the defects were of such a nature as would induce him reasonably to foresee what might endanger his safety.

3. The jury are instructed that if they find for plaintiff they can take into consideration in estimating the damages to be awarded him, the amount expended in effecting a cure of the injury received by the defendant's negligence ; the value of the time lost by plaintiff, a reasonable amount for his physical pain and suffering, and also further damages to be estimated by the difference between the amount he could have earned before the injury and the amount he can earn in his maimed condition.

4. The jury are instructed that if they find the duties of Darron were to provide tools for the men under him, and to see that they were kept in repair, and that he had control over the men under him, with power to discharge them and employ others, he was a manager of defendant, and notice of defects in the tools to him was notice to the company.

Those requested by the defendant were as follows :

1. The defendant moves the court to instruct the jury that the burden of proving every material fact in the case devolves on the plaintiff, and he must prove, to the satisfaction of the jury, before he can recover. That defendant negligently furnished defective tools to work with, or required him to work with fellow-servants who were furnished with defective tools, whereby plaintiff was injured, and that these defects and risks were at the time known to defendant, or by the use of ordinary care could have been known, and were unknown to the plaintiff at the time of and before the injury, and the plaintiff has failed to prove these material facts, and is not entitled to recover ; they are, therefore, instructed to find for the defendant for want of testimony on the part of plaintiff.

2. If the jury believe the plaintiff acted negligently in the use of the tools he had, he cannot recover, for he who sues for damages on account of negligence, must himself be without fault, and must not himself contribute to the injury caused in part by defendant's negligence.

3. If the jury believe from the evidence that the plaintiff was injured by the misconduct or negligence of a fellow-servant of plaintiff while they were engaged in a common employment of defendant, plaintiff cannot recover in this action.

4. The defendant is not responsible for injury received by plaintiff while in its employ by any negligence of a fellow-servant, unless such fellow-servant was known to defendant to be negligent and untrustworthy, and in plaintiff's ignorance of this characteristic, he was compelled to work with him.

5. If the plaintiff was injured by defects in tools or machinery, which defects were known to plaintiff before he was injured, plaintiff cannot recover.

6. If the jury believe from the evidence that defendant, the railroad company, furnished defective tools, yet if they believe plaintiff worked with them after notice of danger to which he was exposed, continued in the employment and was thereby injured, in such case the law considers the plaintiff as having contributed to his own injury, that the plaintiff was as much bound to take care of himself as the defendant was to take care of him, and if plaintiff possessed the knowledge of the matter of the defect in tools, he was bound to refuse to use them, or refuse the employment, and if he failed to do so he assumed the risks incident to the use of such tools, and cannot recover for injuries resulting therefrom.

7. When a person enters into the employment of another, he assumes all the risks incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment, and he cannot recover for injuries resulting to him therefrom; and if the jury believe that the defendant has used ordinary care and diligence in selecting the implements and machinery, and fellow-servants, with which plaintiff was to work in his employment, and had no knowledge of any defect in them, or reason to believe there was any defect which was calculated to inflict the injury, plaintiff cannot recover for any injury resulting to him in the use of defective tools, if he had knowledge of such defect, and with such knowledge continued their use.

8. If the jury believe from the evidence that defendant furnished the tools to work with to plaintiff, and had no means of knowing of any latent or hidden defect in them, and there was no defects in them that was not as open to the inspection of plaintiff as defendant, plaintiff can not recover for any injury resulting from the use of such defective tools caused by such defect.

9. If any defect in the tools existed which plaintiff knew before the injury, he cannot recover for any injury caused by such defect.

10. If the jury believe from the evidence that the injury complained of was the result of an accident, which could not have been foreseen and prevented by the exercise of ordinary care and diligence on the part of defendant, they must find for the defendant.

11. If the jury believe from the evidence that the injury complained of was proximately caused by the manner in which the tools were being used by fellow-servants of plaintiff at the time of the injury, then they should find for the defendant whether they believe the tools were defective or not.

The court, on its own motion, against the objection of the defendant, gave also the following charge :

"There are several propositions of law arising in this case upon the view presented by the defense, to which the court calls your attention : First, as to the liability of the defendant road for an injury resulting from the misconduct of a fellow-servant. The road would not be responsible for an injury arising from the negligence of a fellow-servant while they were engaged in a common employment of the defendant, unless you should find that the proximate cause of the injury was a defective implement furnished by defendant to such fellow-servant. An employé assumes the ordinary risks of negligence on the part of his fellow-servants, but this could not be said to include the risks incident to their negligence while using defective tools furnished by the master. Upon the view presented by the counsel for defendant that the company are not responsible, even though there was negligence in supplying tools, if the plaintiff, knowing such defect, continued in the employment, the court instructs you that if you believe that the defendant railroad company furnished defective tools, yet if you believe the plaintiff continued in its service after notice of such defect and the danger to which he was thereby exposed, and was thereby injured, in such case the law considers the plaintiff as having contributed to his own injury ; that the plaintiff was bound to exercise ordinary care and prudence under all the circumstances of his position to protect himself from injury, and if the plaintiff possessed the knowledge of the matters of defect in the tools, and the danger arising therefrom, he was bound to refuse to use them or quit the employment, and if, with such knowledge, he continued in it, he assumed the risk incident to the use of the tools, and cannot recover for an injury that resulted therefrom.

"When the servant is injured by defective machinery, of the defect in which he has knowledge, he is treated as waiving all risks incident to such defect, but the fact that he might have known of the defect, or had the means or opportunity of knowing of it, will not preclude him from a recovery ; unless he in fact did know of

it, or in the exercise of ordinary care ought to have known of it, he can recover.

"He is not bound to examine the machinery to find defects. He has the right to presume that it is suitable, unless the defects are palpable, and open to ready observation. He is only bound to exercise reasonable attention, and take notice of such defects as such reasonable attention brings to his observation. The duty of the master in the first instance is to furnish safe tools and keep them in repair; but if the servant knows that the tools are defective and unsafe, he assumes all risks incident to their use in such condition if he continues to use them.

"Ordinary care is defined to be the use of such watchfulness and precautions as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. Also, such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself from injury.

"The question of care and diligence, or negligence, is one peculiarly within the province of the jury, and it is for them to settle this in view of all the circumstances surrounding each particular case; the specific degree of care that the master must exercise in each case is to be measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed in and about such business."

The jury returned a verdict for plaintiff for \$1,750.

The defendant filed a motion for a new trial, the grounds assigned for which were the giving of the instructions asked for the plaintiff, and the refusal to give those, except the tenth, asked by the defendant, which motion was overruled.

The doctrine is well settled that where one enters into the employ of another, he assumes, and he is presumed to have contracted with reference to, all the hazards and risks ordinarily incident to the employment, and the master is not liable to him for injuries resulting from an accident which he might not, by ordinary diligence and care, have prevented.

The same rule applies also to perils and risks not incident to the service of which the servant has notice, unless he has been induced to accept the service by the promise or understanding of the master to remove the cause, and he has failed to do so.

Nor is the master liable to him for injuries produced by the negligence of a fellow-servant engaged in the same business, if there be no negligence in the appointment of the latter, or in his retention after notice of his incompetency.

The question of negligence is a mixed one of law and fact, in the determination of which is to be considered whether an act has been done or omitted, and whether, also, the doing or omission of it was a breach of legal duty.

"The extent of the defendant's duty is to be determined by a consideration of his circumstances. The law imposes duties upon men according to the circumstances in which they are called to act; and though the law defines the duty, the question whether the circumstances exist which impose that duty upon a particular person, is one of fact." *Shear. & Red. on Neg.*, 11.

WHARTON says: "As a rule, the degree of diligence required is proportioned to the duty imposed, and the degree of negligence imputed corresponds to the degree of diligence exacted, with the qualification that the utmost degree of diligence exacted is that which a good business man is, under the particular circumstances, accustomed to show." *Whar. on Neg.*, sec. 48.

The evidence in this case conduced to prove that the accident by which the plaintiff was injured, happened in consequence of a maul furnished by the defendant, and used in and about the work the plaintiff was engaged in, having by former use become abraded and broken around the face; and it presented to the jury the question not only whether the accident was so produced, but also, if so, whether, under the circumstances, negligence could be imputed to the defendant.

It was the province of the jury to determine the weight to be given to the evidence, but the first instruction asked by the defendant denies to them that right, and, assuming its insufficiency to prove the negligence alleged, attempted to exclude it from their consideration.

The refusal of the instruction was manifestly right.

There was no implied warranty on the part of the defendant that the tools furnished should be sound and fit for the purpose intended; the law imposed only the obligation to use proper care in providing them. *Shear. & Red. on Neg.*, 103; *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411.

The defendant's liability, therefore, did not depend upon the fact that the maul was defective, but upon the fact that it ought not, in its condition, to have been used about the work in which the plaintiff was engaged.

As said by the court of appeals of New York, in the case of *Leonard v. Collins*, 70 N. Y. 90: "In determining the question of the master's negligence in an action by the servant for an injury alleged to have been sustained by him while in the master's employment, from the negligence of the latter, the jury are to inquire whether, under the circumstances proved, the master did anything which, in the exercise of reasonable and ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken, and as they shall find upon this question (if there was no negligence on the part of the servant), determine their verdict."

"We are not to look solely at the act or the omission, but must take in view also the circumstances. The degree of care and vigilance imposed by the circumstances is not the same in all cases—it varies according to the danger involved in the want of negligence." Cooley on Torts, 630.

"The law makes no unreasonable demands. It does not require from any man superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances." Shear. & Red. on Neg., 5.

"The foreseeing of a harm as remotely and slightly probable, does not involve the imputation of such harm." Whart. on Neg., sec. 76.

It cannot reasonably be contended that a tool or implement, which has become worn and defective by use, but which still answers its purpose, should be cast aside as dangerous, unless there is some apparent cause of danger in its continued use.

"It can only be required of the master, in providing tools or implements for his servant, to use due and reasonable diligence, so as to make it reasonably probable that injury will not occur in the use of them." *Wonder v. Baltimore and Ohio R. R. Co.*, supra.

It was an error, therefore, to instruct the jury, as was done in the plaintiff's second instruction and the charge given by the court on its own motion, irrespective of any probability of danger or harm, that if the maul was defective, and such defect might have, by the use of ordinary care and diligence, been known by the defendant, the defendant was liable to the plaintiff for the injury he received.

Counsel for appellant insist that as there was no evidence as to the age of the plaintiff, his health and physical condition, or as to his probabilities of life, the plaintiff's third instruction, by which the jury were told that they might, in the estimation of the damages, consider the difference between what he was able to earn before the injury and that which he could earn in his maimed condition, should not have been given.

If such part of the instruction was in fact abstract, there is nothing in the case from which we might presume that the jury were misled, and the defendant prejudiced by it, but we think there was some evidence of such difference.

We can see no valid objection to that, nor any to the remaining instructions given for the plaintiff.

There was no evidence to which the second instruction asked by the defendant was applicable. The plaintiff himself used neither of the mauls. He was working with a claw-bar, in the use of which no negligence was charged. There was no error, therefore, in refusing it.

The other instructions refused, the third and those following it,

and, except as just mentioned, the charge of the court, which substantially contains, however, the instructions, appear to be in accordance with the principles we have above stated.

The judgment is reversed and the cause remanded.

See note, vol. 5, p. 504.

GREEN AND COATES STREET PASSENGER RY. Co.

v.

BRESMER.

(94 *Pennsylvania State Reports*, 108. May 2, 1881.)

A master does not warrant the safety of his servants, but is under an implied contract to adopt and maintain suitable instruments and means with which to carry on the business in which they are employed, so that they can perform their duties safely and without exposure to dangers which do not come within the reasonable scope of their employment.

A servant will be deemed to have assumed all risks naturally and reasonably incident to his employment.

Where a servant is injured in the ordinary course of his employment, after having had a fair opportunity to become acquainted with the risks naturally and reasonably incident thereto, he will be deemed to have contracted to submit to such risks, and has, therefore, no right of action against his master for the injury done him.

A., who was employed as an hostler by a street car company, received an injury from the kick of a vicious mare, while engaged in grooming her as was his duty. The fact of the mare's being vicious was known by A., by other employes of the company, and by the officers thereof. A. had once before been kicked by the same mare, but had not asked to have her taken from under his care. At the time of the accident A. was not using a strap which he ordinarily used when grooming the mare to prevent her from kicking. In an action by A. against the company to recover damages for the injury done him, *Held*, that the plaintiff was not entitled to recover.

In an action against a street car company for an injury occasioned by the kick of a vicious mare belonging to the company defendant, evidence is admissible in order to show that the company knew of the vicious character of the animal, that the stable boss was possessed of such knowledge, and had had a conversation with the superintendent of the company relative to the sale of the mare.

JANUARY 19th and 20th, 1881. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKY, STERRETT and GREEN, J.J.

Error to the Court of Common Pleas, No. 1, of Philadelphia county: of January Term, 1880, No. 130.

This was an action on the case by John Bresmer against the Green and Coates Street Philadelphia Passenger Ry. Co., to recover damages for injuries suffered by the plaintiff, on the 9th December, 1878, from the kick of a vicious mare, while being groomed

by the plaintiff, who was an hostler in the employ of the defendant company.

On the trial, before BIRD, J., the evidence showed that the bad character of the mare for kicking was known to the plaintiff; that she had kicked him on a previous occasion in 1876, but he made no complaint, and did not ask to have her taken from under his care; that the plaintiff was in the habit of tying up her foreleg to prevent her kicking, but on the occasion in question he omitted this precaution because, as he testified, he "could not find his strap."

The plaintiff offered to prove by John Mighty, who had been an employé of the company at the time of the accident, that the character of the mare for kicking was known to the stable boss, who had told the superintendent that the president had ordered the horse to be sold, and that the superintendent had replied that he would like to see himself sell the horse, as five trips a day would not hurt her. Objected to; objection overruled; exception (11th and 12th assignments of error). The witness testified in accordance with the offer.

The defendant presented, inter alia, the following points:

4. That if the jury believe the plaintiff's statement that he had been previously kicked by the same horse complained of in this case, and that he still remained in the company's service, and in charge of the horse in question, he thereby assumed the risk of being kicked by it, and the verdict must be for the defendant. Refused. (5th assignment of error.)

5. That if the jury believe from the evidence that the horse in question was accustomed to kick, and that the plaintiff, knowing the fact, remained in the service of the defendant as hostler, then even if the defendant were fully aware of the said propensity of the horse, the plaintiff cannot recover, but the verdict must be for the defendant.

9. That the plaintiff can recover in this case only on the ground that the injury was caused by the negligence of the defendant, and if the jury find from the evidence that the defendant had in its possession a mare disposed to kick, which was placed in the care of the plaintiff, that he had knowledge of the disposition of the mare, and whilst in the performance of his duty as hostler of the defendant he received his injury from a kick of the mare, he cannot recover in this action, even if the jury believe that the defendant knew of the disposition of the horse.

10. It was not negligence in the defendant to keep this mare, even if she was a kicker and the defendant knew it, if the plaintiff had knowledge of the fact and had been warned against her disposition.

His Honor answered the 5th, 9th and 10th points together, as follows:

"If the servant, in obedience to the orders of the company, took charge of this horse, and, although he knew him to be dangerous, reasonably supposed that he could, by unusual caution and skill, escape injury, it would not relieve the defendant here, if, after taking such precaution, he was injured." (6th, 7th, 8th and 10th assignments of error.)

BIDDLE, J., charged the jury, *inter alia*, as follows:

"A man who engages to perform certain services for money, takes upon himself the risks incident to the performance of those services, subject to this qualification, viz.: But if the master increases those risks beyond the natural risks of the employment, the servant does not, as an implied part of his contract, take those risks. . . . The defendant had no right to expose the plaintiff to danger from a horse which it knew to be dangerous and vicious.

"[If, then, the evidence satisfies you that this horse was dangerous and vicious, and that this fact was made known to the stable boss and the superintendent, it would be negligence on the part of the company to subject persons in their employ to such risks. That was not one of the ordinary risks of their employment.]

"[If, in this case, the plaintiff knew that the mare was so dangerous, that she could not safely be cleaned without having her leg tied up, and he recklessly attempted to do so without tying her up as he was accustomed to do, that would constitute contributory negligence, and he cannot recover.]"

Verdict and judgment for the plaintiff for \$625. The defendant took this writ of error, assigning for error, *inter alia*, the admission of the evidence objected to, the answers to the above points, and the portions of the charge enclosed brackets.

Henry Budd, Jr. (with whom was George W. Thorn), for the plaintiff in error.—The danger of being kicked by a horse is an ordinary risk, incident to the business of a groom. Even regarding it in this case as an extraordinary risk, Bresmer had become fully aware of it, and by remaining in the defendant's employ, without complaint or notice, he voluntarily assumed it and should not have been allowed to recover: *Whart. Neg.*, sect. 199; 1 *Add. on Torts* § 569; *Wood, Master and Servant*, 793; *Dynen v. Leach*, 40 *Eng. L. & E. Rep.* 491; *Frazier v. Pennsylvania R. R. Co.*, 2 *Wright*, 104; *Mansfield Coal and Coke Co. v. McEnery*, 10 *Norris*, 185. Moreover, in this case, the plaintiff was guilty of contributory negligence, in omitting the means of protection against the mare's kicking, by tying up her front leg, which he was always in the habit of doing while grooming her. The judge erred in charging, that if the plaintiff "recklessly" attempted to groom her without using this precaution, he could not recover, thus leaving the jury too great latitude.

Gustavus Remak, for the defendant in error, presented no paper-book and made no argument.

MEEBOW, J.—This action was to recover damages for injuries which the defendant in error suffered by the kick of a horse, owned by the company. He was in the employment of the latter as an hostler. As such, he had charge of several horses, including the one which injured him.

A master does not warrant his servant's safety. He, however, is under an implied contract with those whom he employs, to adopt and maintain suitable instruments and means with which to carry on the business in which they are employed. This includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duties safely or without exposure to dangers that do not come within the reasonable scope of his employment: *Cayzer v. Taylor*, 10 Gray, 274; *Seaver v. Boston and Maine R. R. Co.*, 14 Id. 466; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572. A servant, however, assumes the risk naturally and reasonably incident to his employment. He is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 548; *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 541; *Whart. on Neg.*, sect. 217. Inasmuch as the relation of master and servant cannot imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself, he cannot complain if he is injured by exposure, after having the opportunity of becoming acquainted with the risks of his employment, and accepts them: *Id.* sects. 214 and 217; 1 *Add. on Torts*, sect. 255.

The undoubted evidence in this case shows the defendant in error had full knowledge of the vicious habits of the mare which kicked him. She had kicked others, and her reputation was well known to the persons employed about the stables, and they were warned to guard against being injured by her.

The defendant in error testified, that she had kicked him before, yet he swears, "I never complained or asked to have my stock changed;" and still further, "I always strapped up the front leg, but on that morning, I could not find my strap." Thus, he not only had full knowledge of her practice, and of the risk and danger he incurred when grooming her, yet he made no complaint, and was accustomed to protect himself by so securing a front leg as to prevent her kicking.

No duty was imposed on the company to inform him of what he so well knew, nor to forbid his grooming the mare. He voluntarily assumed the risk, and continued to expose himself to a well-known

danger. He cannot now cast on his employer a liability for the injury which he thereby suffered. It matters not that the master did know the vicious habits of the mare. It is the knowledge of the servant which withholds from him a right of action: *Haskin v. New York Central R. R. Co.*, 65 Barb. 129; *Frazier v. Pennsylvania R. R. Co.*, 2 Wright, 104.

It follows, the learned judge erred in not affirming the points covered by the fifth, sixth, seventh, eighth and tenth assignments. We discover no error in the eleventh and twelfth assignments. In so far as the remaining assignments are in conflict with this opinion, they are sustained.

Judgment reversed.

See note, vol. 5, p. 504.

THE WABASH RAILWAY COMPANY

v.

EWING H. ELLIOTT.

(98 *Illinois Reports*, 481. May 13, 1881.)

A servant of a railway company, to recover of the company for a personal injury growing out of alleged negligence on the part of the company, must have used ordinary care on his part, considering his surroundings,—that is, such care as a man of ordinary prudence would usually exercise under the same or like circumstances.

It is not the province of the circuit court to determine, in an action to recover for an injury occasioned by the alleged negligence of the defendant, what circumstances will be sufficient to charge a plaintiff with want of ordinary care, and thus prevent a recovery by him. Therefore, an instruction which directs the jury, in substance, what circumstances will show or constitute a want of ordinary care in the plaintiff, is properly refused.

APPEAL from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Brown county.

This was an action on the case, by the appellee against the appellant, brought in the circuit court of Brown county, to recover for personal injury alleged to have resulted from negligence on the part of the appellant.

The negligence charged in the declaration was, that the railway company placed an iron rod or timber across the top of the west end of the bridge on its road, in Valley City, so low as to endanger the lives and safety of the employes of the company, and negligently permitted it to remain in such dangerous position until the plaintiff, as brakeman, while on the top of a train, in the line of his duty, using due care, was struck and injured on the head by the rod or timber, as the train was coming from the west, on July 3, 1878.

The trial resulted in a verdict and judgment in favor of the appellee for \$2,500, which judgment was affirmed by the Appellate Court for the Third District. The railway company brings the case to this court by appeal, and assigns for error, that the verdict, on the evidence, should have been set aside, and also that the court erred in refusing its sixth instruction asked. That instruction reads as follows:

"The law, for wise purposes, requires every sane man to use and employ his reason and his senses under all ordinary circumstances of life; and if the jury believe, from the evidence, that the plaintiff, as brakeman, before the injury complained of, enjoyed fair and reasonable opportunities for acquiring a knowledge of the condition of said bridge, and the danger arising therefrom,—if any there was,—but ignoring such opportunities, and refusing or neglecting to avail himself thereof, wilfully or negligently remained in ignorance of the condition of said bridge, if the same was dangerous, he cannot take or derive any advantage from such ignorance, but his rights are to be determined the same as if he possessed the knowledge he might have acquired by the reasonable exercise of his faculties."

Messrs. Brown, Kirby and Russell, and Mr. W. L. Vandeventer, for the appellant.

The Circuit Court erred in refusing a new trial to the appellant, and the Appellate Court erred in not reversing the judgment of the Circuit Court for that reason. *Indianapolis, Bloomington and Western R. R. Co. v. Flanigan*, 77 Ill. 371; *Illinois Central R. R. Co. v. Welch*, 52 id. 188.

If the plaintiff knew of the danger complained of, he should have quit the service of the company, unless induced by the company to believe a change would be made; and his continuing in the company's employ with such knowledge prevents a recovery for any injury occasioned by the known danger. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Chicago and Alton R. R. Co. v. Munroe*, 85 id. 25; *Shearm. & Redf. on Neg.* § 94; *Buzzell v. Laconia Mfg. Co.* 48 Me. 113; *Patterson v. Wallace*, 1 Macg. H. L. 748; *Loomam v. Brockway*, 3 Robertson, 74; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541; *Griffiths v. Gidlow*, 3 Hurls. & N. 648; *McGlynn v. Brodie*, 31 Cal. 376; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 549; *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Priestly v. Fowler*, 3 M. & W. 1; *Dynam v. Leach*, 40 Eng. L. & Eq. 491; *Woodley v. Metropolitan R. R. Co.*, 2 Law Times, 384; *Indianapolis, Bloomington and Western R. R. Co. v. Flanigan*, *supra*; *Chicago, Burlington and Quincy R. R. Co. v. Clark*, 2 Bradw. 596; *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99; *De Witt v. Pacific R. R.* 50 Mo. 302; *Baylor v. Delaware R. R. Co.* 40 N. J. L. 23; *Owen v. New York R. R.* 1 Lansing, 108; 2 Thompson on Neg. 1013.

Where the servant's action is founded on the assumption that the

master ought to have known of the defect which caused the injury, it is clearly a sufficient defence to show that the servant had equal means of knowledge. *Shearm. & Redf. on Neg. § 94.*

If one knowingly exposes himself to danger which can be readily avoided, and sustains injury, he must attribute it to his own negligence. *City of Bloomington v. Read*, 2 Bradw. 547; *Toledo, Wabash and Western R. R. Co. v. Eddy*, 74 Ill. 138.

There was an error in refusing appellant's sixth instruction. That it contains a correct proposition of law we refer the court to the following authorities: *St. Louis and Southeastern R. R. Co. v. Britz*, 72 Ill. 257; *Indianapolis, Bloomington and Western R. R. Co. v. Flanigan*, supra; *Shearm. and Redf. on Neg. § 94*; *Whart. on Neg. § 214.*

Mr. John J. McDannold, Messrs. Ewing and Hamilton, and Mr. William H. Barnes, for the appellee.

Knowledge on the part of the servant, that the machine or appliance is defective or dangerous, while not sufficient of itself to take the case from the jury, is, nevertheless, evidence of negligence to go to the jury. *Thompson on Neg.* 1015; *Shanny v. Androscoggin*, 66 Me. 420; *Coombs v. New Bedford C. Co.*, 102 Mass. 572.

This doctrine applies even to a case where the servant is injured by the machine or appliance he works with, of which he is presumed to have the best means of knowledge. But the case is very different where his injury is caused by other defects of which he has no better means of knowledge than his employer. In this State it is settled doctrine, that he may presume that there is no dangerous defect in the "construction of the road, and its appurtenances and bridges." *R. R. Co., v. Swebb*, 45 Ill. 197; *Fairbank v. Hentzche*, 73 id. 239; *Thompson on Neg.* 1012. This instruction was refused in *Dorsey v. Phillip & Co.* 72 Wis. 583. The *Flanigan* case (77 Ill. 365), is not authority against this view, as the injury was caused by a defect in the coupling of the car the servant was working with. The *Britz* case (72 Ill. 256), is not applicable for the same reason, and is less in point. It is not the law applicable to this case to tell the jury that plaintiff's "rights are to be determined the same as if he possessed the knowledge he might have acquired by the reasonable exercise of his faculties."

DICKEY, C. J.—As to the weight of the evidence relating to the allegation of facts, the judgment of the Appellate Court is conclusive. As to the instruction asked by the appellant, and which the Circuit Court refused to give, we think the decision was right.

It is not the office of the Circuit Court to determine what circumstances will be sufficient to charge a plaintiff with want of ordinary care, or such want of care as will cut off a right of recovery. The law of this case required of the plaintiff that he should use ordinary care, considering his surroundings,—that is, such care as men of

ordinary prudence would usually exercise under the same or like circumstances. By asking this instruction the court was called upon to usurp the province of the jury, and direct them, in substance, as to what circumstances would show or constitute a want of ordinary care.

Finding no error, the judgment of the Appellate Court in this case is affirmed.

Judgment affirmed.

See *Rains v. St. Louis, etc., R. R. Co.*, post. Also note, vol. 5, p. 504.

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See **CORPORATION, 18.**

BOND.

1. A railroad has the power, without any specific authority being conferred by the charter, to accept a perpetual loan and to issue irredeemable bonds to the lenders. *Phila., etc., R. R. Co., Appeal, 118.*

2. A railroad authorized by Act of Assembly to issue such bonds, at such prices and in such manner as it sees fit, but without further express power to borrow money, proposed to raise a fund by issuing \$50 irredeemable bonds, at the rate of \$15 each, to bear interest at the rate of six per cent on their face value, payable out of the earnings after defraying current expenses and distributing a dividend on the stock, said bonds to be entitled to share *pari passu* with the common stock in any surplus revenues of the company. A. B. contracted with the company to purchase such bonds. Subsequently, upon A. B. tendering the purchase money, the company refused to issue to him the bonds for which he had subscribed, on the ground that their issue was beyond the chartered powers of the corporation. A bill being filed by A. B. against the company for specific performance of the contract: *held*, that the company could validly issue such bonds, that they were not usurious in their nature, and that therefore complainant was entitled to the relief prayed for. *Id.*

3. After an election had been held in the municipal township of K., in accordance with the provisions of "An act to enable counties, townships and cities to aid in the construction of railroads, and to repeal sec. 8, ch. 39 of the Laws of 1874," and the amendments thereto, which resulted in authorizing the township of K. to subscribe to the capital stock of the Atchison and Denver Ry. Co. 180 shares of \$100 each, payable in bonds of the township, dollar for dollar, the county clerk made the subscription, in pursuance to the power conferred. On December 20, 1879, the company had completed 8 $\frac{1}{4}$ miles of main track and $\frac{1}{16}$ of a mile of side-track in the township, and the board of county commissioners then issued and delivered to the company \$18,000 of said bonds. On December 23, 1879, the Atchison and Denver Ry. Co., in accordance with the provisions of the act of March 1, 1870, consolidated with the Waterville and Washington R. R. Co., the Republican Valley Ry. Co., the Atchison, Solomon Valley and Denver Ry. Co., and the Atchison, Republican Valley and Pacific Ry. Co., under the corporate name of "The Atchison, Colorado and Pacific R. R. corporation." The latter extended the railroad in the township to make 6 $\frac{1}{16}$ miles. *Held*, that the township of K. was not released from the subscription for any part of the stock subscribed to the Atchison and Denver Ry. Co. by the consolidation after such subscription had been made. And held further, that the new corporation, as successor of the Atchison and Denver Ry. Co., is entitled to all the bonds to be issued under the subscription and the proposition submitted, not delivered prior to the consolidation. *Atchison, etc., R. R. Co. v. Phillips Co., 327.*

BOND—Continued.

4. Measure of Township Aid to Railroad Corporation. Where the proposition submitted under the law of 1876, and the amendments thereof, to the electors of a township for the subscription of stock and the issuance of bonds to aid a railroad corporation to construct its road from the east line of the township west to and into the city of K. (a place equidistant between the east and west lines respectively of the township), the terms of the proposition embrace aid to the corporation for all the main line and side-tracks built from the east line to and within the city of K. necessary for the efficient running and operating of the railroad; provided, however, in no case shall the total amount of the aid to the corporation exceed four thousand dollars per mile for each mile constructed in the township. *Id.*

5. A statute authorizing the guarantee by the state of certain bonds of a railroad company to be secured by a statutory lien, was passed in 1861, and the bonds issued and guaranteed under the authority of this act bore the caption "Confederate States of America." In 1866, another act was passed which extended the operation of the act of 1861, and authorized the issue of new bonds in exchange for the C. S. A. bonds, also certificates of indebtedness to pay interest past due on the C. S. A. bonds, and bonds for other indebtedness, all of which were to be in like manner guaranteed. *Held*, that the C. S. A. bonds, not surrendered, were of superior rank to the bonds issued under the act of 1866, but those issued under act of 1866, in exchange for bonds surrendered, could claim a lien only under the latter act, and stood upon the same footing with all other bonds issued under the act of 1866. *Gibbes v. Greenville, etc., R. R. Co.*, 460.

6. Under an act of the legislature passed in 1869, certificates of indebtedness were authorized to be issued by a railroad company for funding interest due upon its bonds which were secured by a lien under an act of 1866, and which lien was extended by the later act to cover these certificates of indebtedness. *Held*, that this was a mere substitution, and not a payment, and that the lien of these certificates was superior to that of a mortgage executed between 1866 and 1869. *Id.*

See CORPORATION, 8-16, 17, 29. MORTGAGE, 1-3, 17, 20. MUNICIPAL CORPORATION, RECEIVER, 7.

BRANCH ROAD, 514.

See MORTGAGE, 19.

CARRIER.

1. Certain cattle while in transportation were unloaded from the cars of the company, and were then illegally seized under a writ for an alleged violation of the statute of the state prohibiting the introduction of Texas, Mexican, or Indian cattle into the state, and subsequently were sold to satisfy the fine, the costs of the proceedings, and the forage and care of the cattle. *Held*, that the company was not liable for the loss of the cattle, upon the allegation of a wrongful unloading, the damages being too remote. *McAllister v. Chicago, etc., R. R. Co.*, 210.

See NEGLIGENCE, 33-41. RECEIVER, 2, 3

CERTIFICATE OF INDEBTEDNESS, 460.

See BOND, 4. RECEIVER, 7.

CHARTER, 191, 161, 202.

See EMINENT DOMAIN, 1, 2. STREET RAILWAY, 11, 16.

CHILD.

See MINOR, NEGLIGENCE, 2-5, 7-9, 12-14, 20-23, 26-31, 38-41, 43-53. PLEADING AND PRACTICE, 33.

CITY LIABILITY AS STOCKHOLDER, 345.

See STOCK, 27.

CONFEDERATE BONDS, 460.

See BOND, 3.

CONSOLIDATION OF COMPANIES.

See CORPORATION, 19-24, 27. MORTGAGE, 16, 18.

CONTRACT, 212, 443, 406.

See CORPORATION, MORTGAGE, PLEADING AND PRACTICE, 9, 16.

CONSTRUCTION OF, 100.

See DEPOT, 1.

CORPORATE POWERS, 182.

See STREET RAILWAY, 8-10.

CONSTITUTIONAL LAW, 5.

1. Where the legislature have enacted a law, which has not been judicially declared to be unconstitutional, a private person is not bound at his peril in damages to know that the law is unconstitutional and void. *McAllister v. Chicago, etc., R. R. Co.*, 210.

2. Private rights vesting during the war between the states are protected by the constitution of the United States, and cannot be impaired by an ordinance of the South Carolina state constitutional convention of 1868. *Gibbes v. Greenville, etc., R. R. Co.*, 459.

See CORPORATION, 28. PLEADING AND PRACTICE, 1. STREET RAILWAY, 10. STOCK, 14.

CORPORATION, 6.

1. By the Ohio Revised Statutes, Sec. 8248, the powers, business and property of the corporation having a capital stock must be exercised, conducted and controlled by its board of directors, who are duly elected and qualified; and a court of equity will not, on the application of a stockholder, interfere with its management and control of the corporate business, while acting within the scope of its authority, unless they are guilty of a breach of trust to the injury of such stockholder. *Sims v. Brooklyn, etc., R. R. Co.*, 182.

2. This principle is applicable to the action of the board of directors in receiving subscriptions for that portion of the authorized capital not taken before the corporation was organized, where it will promote the objects of the corporation. A subscription for such stock made by one member of the board, with the consent of the others, and payment of the par value thereof, when the transaction is free from fraud, and is beneficial to the corporation, will not be set aside, at the instance of a stockholder, when no action has been taken to withhold such stock from subscription or sale. *Id.*

3. An agreement between two corporations, whereby one guarantees the other a certain specified annual dividend on its capital stock, is not a guarantee to its stockholders severally, but to the corporation, and the power to modify the terms of such guarantee is in the directors of such corporations, not in the stockholders. Where such power is fairly exercised by the directors, in view of all the circumstances, and in good faith, a court will not interfere, even though, on the same facts, it might have arrived at a different conclusion. *Flagg v. Manhattan Ry. Co.*, 141.

4. The directors of a corporation occupies a fiduciary position, and so is within the rule disenableing one entrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust. *Duncomb, v. N. Y., etc., R. R. Co.*, 298.

5. The right of the corporation, or those claiming through it, to avoid any such dealings does not depend upon the question whether the director was acting fraudulently or in good faith. *Id.*

6. But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received. *Id.*

7. Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt. *Id.*

8. The director of a railroad corporation cannot purchase its bonds below par

CORPORATION—Continued.

except on peril of avoidance by the courts upon application of the corporation. *Id.*

9. But as he may be the lawful holder of such bonds, knowledge upon the part of a purchaser from him for value and in good faith of bonds so bought that he is a director, does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title. *Id.*

10. Where, however, bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter. *Id.*

11. Under the provision of the General Railroad Act (sub. 10, § 23, chap. 140, Laws of 1850) authorizing a corporation organized under it to borrow moneys necessary for completing, finishing or operating its road, to issue and dispose of its bonds and to mortgage its property and franchises "to secure the payment of any debt contracted for the purposes aforesaid," a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified. *Id.*

12. Upon foreclosure of a mortgage given to secure its bonds, a holder of bonds so pledged as collateral is not limited to proof of an amount simply equal to the amount of his debt, but is entitled to prove the whole amount of his bonds, and to share in the distribution accordingly up to the amount of his debt. *Id.*

13. The L. and I. Co. by its charter (§ 5, chap. 730, Laws of 1871) is authorized to "advance moneys . . . upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced. *Id.*

14. Where the president of a railroad corporation received the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary, *held*, that such a debt fairly and honestly incurred could be so secured; and that he was entitled to prove such bonds. *Id.*

15. Also *held*, that one to whom bonds were pledged as security for an indebtedness for rent of offices was entitled to prove them; that a business office was essential and necessary and was embraced within the authority to issue bonds. *Id.*

16. A pledgee of certain of the bonds claimed that the pledge had been foreclosed by sale at auction and that through such sale he became the owner; the terms of the sale, or whether before sale there was a demand of payment or notice to redeem, did not appear. *Held*, that as no right to sell was shown, the holder of the bonds must still be treated as pledgee. *Id.*

17. Where a question arises under a Federal law and respects a corporation created by its authority, the rulings of the Federal courts must be followed. *Id.*

18. Accordingly *held*, that the decision of the United States Supreme Court, in *G. M. Co. v. Nat. Bank* (96 U. S. 64), was conclusive here, holding that a contract of loan made by a National bank was valid and could be enforced although violative of the provision of the National Banking Act (U. S. R. S., § 5200) prohibiting a loan to one individual exceeding one tenth part of the capital of the bank. *Id.*

19. The consolidation of the Houston and Great Northern, and the International Railway companies, was unauthorized and wrongful as to a stockholder of the former company objecting thereto, and the same having been consummated by a wrongful appropriation of the stockholder's equitable interest, the consolidated company was equitably bound to him therefor. *International, etc., R. R. Co. v. Bremond*, 309.

20. The two railway enterprises differed so widely in their starting-points, and the region of country to be traversed, that an original subscriber to the Houston and Great Northern Company might well object that he had not agreed to or authorized such a union, nor did he, by failing to object to a subsequent enlargement of the charter, which, whether it actually gave such power or not, did not, on its face, purport to give any power to consolidate, preclude himself

CORPORATION—Continued.

from objecting to a consolidation making so fundamental a change in the objects of the corporation. *Id.*

21. A stockholder in a railway company which, against his protest, has been consolidated without authority of law with another company, by the action of other stockholders, and whose equitable interest has been wrongfully appropriated by the consolidated company, cannot maintain an action for the injury against the directors of the company, as such; nor are the directors responsible to the corporation for a consolidation effected by act of the stockholders. *Id.*

22. A stockholder in a railway company, against whose protest a consolidation was illegally effected by the company with another railway company, delayed for more than two years the institution of proceedings against the consolidated company for the appropriation of his equitable interests: *held*, that while the delay might preclude him from enjoying the further prosecution of the consolidated enterprise, it did not prevent him from following up his equitable interest in the hands of a corporation, which, by appropriating it without authority, became equitably bound to compensate him therefor. *Id.*

23. A railway company, in an action against it by a stockholder for wrongful conversion of his interests, is not precluded by the erroneous estimates of its officials, embodied in a published report, from showing the true value of its assets. *Id.*

24. The act of January 12th, 1858 (Arkansas), creating the Little Rock and Napoleon R. R. Co., is a public act, of which the courts will take judicial notice; and by it the company was immediately created a corporation; and having, in good faith, commenced the construction of its road before the adoption of the constitution of 1874, its charter was not revoked by section 1, Article XII, of that constitution. *Little Rock, etc., R. R. Co. v. Little Rock, etc., R. R. Co.*, 892.

25. Pending a suit began by appellee against the Waco and N. W. Ry. Co., July 16, 1870, the Houston and Texas C. R. R. Co. entered into a contract with the former road to aid in its construction. For a debt thus contracted the Waco and N. W. R. R. Co. was sold under a deed of trust given to the Houston and T. C. R. R., and the latter road, at the sale in February, 1873, became the purchaser of the property and franchises of the Waco and N. W. R. R. Afterwards, in May, 1878, an act of the legislature was passed for the merger of the two roads, making the sold-out road a part of the purchasing road. Afterwards, in January, 1877, the Houston and T. C. R. R. was made a party defendant, charging that the contract between the roads was illegal, fraudulent and ultra vires, and seeking to make the purchasing road liable for the debts of the Waco and N. W. R. R. *Held*—

1. Ordinarily, a consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation; but this rule is restricted to voluntary consolidations.

2. The foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest on agreement, either express or implied.

3. The act of merger was not passed by the legislature, or accepted in contemplation of an agreement between the companies, but because the trust sale had divested the Waco and N. W. R. R. Co. of all its property and franchises, and that the purchaser, being a corporation, needed, for that reason only, legislative sanction to authorize it to operate the road.

4. If the Houston and T. C. R. R. Co. exceeded its powers in acquiring the property, it was a consummated transaction and could be impeached, if at all, for that reason, by the state alone.

5. The purchasing road by its contract assumed only the liabilities created by the Waco and N. W. R. R. in the construction of its road after its first contract was made with the Houston and T. C. R. R. Co.

6. That the act of merger did not affect the rights of either stockholders or creditors.

CORPORATION—Continued.

7. That by accepting the conditions of the act of consolidation, the Houston and T. C. R. R. Co. did not subject itself to pay the liabilities of the sold-out road. *Houston v. T. C. R. R. Co.*, 441.

28. The Texas constitution of 1866 did not prevent the franchise of a railway company from being mortgaged and sold under a decree of foreclosure, or by a trustee empowered to sell. *Id.*

27. "An act to promote the consolidation of the Greenville and Columbia R. R. Co." provided in its 4th section for a waiver of the lien of the state on the Blue Ridge R. R. property, and in its 5th section for a like waiver of lien upon the property of the Greenville and Columbia R. R. property, and in its 7th section for the endorsement by the consolidated companies of the bonds of the two companies consolidating. The two companies not having consolidated, *held*, that the act never took effect. *Gibbes v. Greenville, etc., R. R. Co.*, 460.

28. Where an act of the general assembly provided that all the property of a railroad company should stand pledged and mortgaged to the state for the payment of certain bonds issued by such company, and guaranteed by the state, such provision constituted a statutory lien for the benefit of the bondholders as well as the state, which no subsequent statute could postpone. *Id.*

29. Where the state guaranteed the bonds of the company, issued in exchange for outstanding mortgage bonds, under a statute which provided that the state should take and retain possession of the bonds so surrendered in exchange as security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired; all of the mortgage bonds not having been surrendered or exchanged, *held*, that the state could assert the lien of the mortgage bonds so held by her, together with the coupons thereto attached, as of equal rank with the mortgage bonds not exchanged. *Id.*

30. A railroad company having filed a survey of a route over which another company also had filed a survey, having held such other company out as the builder of the track over such route, and having taken the benefit of a contract incident to the laying of such route, made in the name of such other company, cannot repudiate such contract, on the ground that itself is the builder of such road. *Coe v. Delaware, etc., R. R. Co.*, 513.

See STOCK.

CONVERSION, 219.

See PLEADING AND PRACTICE, 21-24.

COUPON, 251.

See MUNICIPAL CORPORATION, 4, 5.

DAMAGES, 540.

See NEGLIGENCE, 10, 11, 47, 49.

DEED, 430.

See MORTGAGE.

DEFINITION, POWERS OF AGENT AND TRUSTEE, 212.

See PLEADING AND PRACTICE, 19.

DEPOT.

A railway company obligated itself to locate its depot at the nearest practicable point within one mile of the court-house. *Held*—

1. The word practicable was not used in the contract as synonymous with possible. *Wooters v. International, etc., R. R. Co.*, 100.

2. The road was only bound to locate its depot at the nearest point within one mile of the court-house, at which it could be done at a reasonable and ordinary cost, with reference to all the circumstances under which it was to be done, and in view of the objects and purposes inducing the contract. *Id.*

See PLEADING AND PRACTICE, 2-4.

DIRECTOR, 140.

See CORPORATION, 1-3. PLEADING AND PRACTICE, 9.

DISCOUNTING NOTES, 268.

See CORPORATION, 18.

DIVIDEND, 265.

See STOCK, 1-14.

GUARANTEE OF, 140.

See CORPORATION, 3.

DOMICIL, 105.

See PLEADING AND PRACTICE, 5, 6.

EMINENT DOMAIN, 11.

1. A railroad company, authorized by its charter to construct a road from an incorporated city to another point, accepted an ordinance passed by the councils of said city, granting it a right of way up to a certain point therein. It then built its track up to that point, and established there its freight and passenger depots. There was no other act upon its part indicating an intention to fix the terminus at that point. *Western Penna. R. R. Co.'s Appeal*, 191.

2. *Held*, that the power reposed in the company to locate and establish a terminus had not been exhausted, and that it might, with the consent of the city councils, subsequently extend its line to a point beyond that where its depots were situate. *Id.*

3. Independently of the question whether the company had fixed its terminus, the construction of the new track, above referred to, was fully authorized by the Act of April 4, 1868, § 9 (P. L. 62), enabling railroads to construct such branches from their main lines as they may deem necessary to increase their business and accommodate the public. *Id.*

4. The construction of such new track by virtue of an ordinance of the city councils, whereby certain provisions were made as to its location and grade, was fully authorized by the Act of June 9, 1874 (P. L. 282), enabling cities to contract with railroad companies for the relocating, changing or elevating of tracks so as to secure the safety of life or property, and promote the interests of the municipality. *Id.*

5. The land of a railroad company, consisting of a portion of a disused public canal purchased from the Commonwealth, upon which no tracks are actually laid by the owner, although they are shortly to be laid, is liable to be crossed by the tracks of another railroad company in such a manner as will not interfere with the use thereof by the owner for the construction of a railroad. *Id.*

See CORPORATION, 30. STREET RAILWAY, 15.

EMPLOYEE, INJURIES RESULTING FROM ACT OF, 538.

See NEGLIGENCE, 5, 7, 8, 12-14, 20, 22, 23, 39-43, 51, 52.

EQUIPMENT, 488.

See MORTGAGE, 16.

ESTOPPEL, 34, 388.

See STOCK, 25. RECEIVER, 10.

EXECUTOR, 219.

See PLEADING AND PRACTICE, 22.

EXTENSION OF TRACK, 191.

See EMINENT DOMAIN, 1-5, 8, 10, 14-16.

FOREIGN CORPORATION, 266.

See PLEADING AND PRACTICE, 25. STOCK, 11, 12.

FORFEITURE OF STOCK, 349.

See STOCK.

GUARDIAN, RIGHT TO SUE BY, 589.

See PLEADING AND PRACTICE, 33.

INJURY BY ACT OF EMPLOYEE,

See NEGLIGENCE, 5, 7, 8, 12-14, 20, 22, 23, 39-41, 43, 51, 52.

INTEREST, DEFAULT OF, 480.

See MORTGAGE, 11-15.

——— **FUNDING OF, 460.**

See BOND, 4.

IRREDEEMABLE BOND, 118.

See BOND, 1, 2.

JURISDICTION, 1.

See RECEIVER, 6.

LACHES, 309.

See CORPORATION, 21.

LAND ACQUIRED SUBSEQUENT TO MORTGAGE, 508.

See MORTGAGE, 17.

LEASE, 88.

See RECEIVER, 8-10.

LIABILITY OF OFFICER,

See DIRECTOR.

——— **OF STATE FOR ACTS OF RECEIVER, 86.**

See RECEIVER, 11.

LIEN, 409.

See MORTGAGE.

LOCATION OF DEPOT, 100.

See DEPOT, 1.

LOOKOUT ON TRAIN, 562.

See NEGLIGENCE, 18, 22, 24, 52.

MASTER AND SERVANT.

1. Plaintiff was injured by the breaking of the rope of a derrick, while assisting in discharging ore from his boat to the defendant's cars. It did not appear that the derricks were used for defendant's benefit; that its officers had any control over them, or that it furnished the rope. It appeared that for a long time the derrick was under the control of M. & Co., who employed the men who discharged the cargo. *Held*, that defendant was not liable. *Derrenbacher v. Lehigh, etc., R. R. Co.*, 628.

2. A railway is not liable to its employees as an insurer for injuries caused by defective implements it may furnish them, if all proper precautions be taken to see that they are reasonably safe and strong. *Galveston, etc., R. R. Co. v. Delahunty*, 628.

3. Negligence in a corporation in the performance of its duty to its employees to furnish them safe and suitable implements, is a fact to be established for the jury. But when the injury complained of is traced to defective implements furnished by the master, whether any further evidence of negligence is necessary, until it is shown by the master that reasonable care was exercised in their selection, *quære?* *Id.*

4. To require a reversal of a judgment in the Supreme Court because of error in a charge, it must be a material error, to the prejudice of the party complaining of it. When it is manifest that an erroneous charge operated no injury, or where no other conclusion than that arrived at by the jury can be legitimately deduced from the facts, the Supreme Court will refuse to reverse the judgment. *Id.*

5. A party who made no complaint of a charge at the trial, but apparently acquiesced in it, should be required to make a more conclusive showing that his rights had been prejudiced by it, than would be required of one who exercised vigilance in protecting his interests, and objected at the right time. *Id.*

6. Plaintiff was a brakeman in the service of the defendant railroad company, and while coupling cars was injured. *Held*, that he assumed the risks and dangers incident to the service, and could not recover compensation for any ac-

MASTER AND SERVANT—Continued.

cidental injury: *Held* further, that the engineer and brakeman operating a train are fellow-servants. *Nashville, etc., R. R. Co. v. Wheeler*, 633.

7. When one enters into the employ of another, he assumes and is presumed to have contracted with reference to all the risks and hazards ordinarily incident to the employment; and the master is not liable to him for injuries resulting from an accident which he might not, by ordinary care and diligence, have prevented. The same rule applies, also, to perils and risks not incident to the service, of which the servant has notice, unless he has been induced to accept the service by the promise of the master to remove the cause, and he has failed to do so. *Little Rock, etc., R. R. Co. v. Duffy*, 638.

8. The master is not liable for an injury to his servant, caused by the negligence of a fellow-servant engaged in the same business, if there be no negligence in the appointment of the latter, or in his retention after notice of his incompetency. *Id.*

9. The question of negligence is a mixed one of law and fact, in the determination of which it is to be considered whether an act has been done or omitted, and also whether the doing or omission of it was a breach of legal duty. *Id.*

10. There is no implied warranty on the part of the master that the tools furnished his servant are sound and fit for the purposes intended. He is only bound to use proper care in providing them. *Id.*

11. That a master might have known by the use of ordinary care and diligence that a tool furnished his servant for use was defective, is not sufficient to make him liable for the injury resulting from its use, irrespective of any probability of harm or danger in using it. *Id.*

12. A master does not warrant the safety of his servants, but is under an implied contract to adopt and maintain suitable instruments and means with which to carry on the business in which they are employed, so that they can perform their duties safely and without exposure to dangers which do not come within the reasonable scope of their employment. *Green, etc., R. R. Co. v. Bresmer*, 647.

13. A servant will be deemed to have assumed all risks naturally and reasonably incident to his employment. *Id.*

14. Where a servant is injured in the ordinary course of his employment, after having had a fair opportunity to become acquainted with the risks naturally and reasonably incident thereto, he will be deemed to have contracted to submit to such risks, and has, therefore, no right of action against his master for the injury done him. *Id.*

15. A., who was employed as an hostler by a street-car company, received an injury from the kick of a vicious mare, while engaged in grooming her as was his duty. The fact of the mare's being vicious was known by A., by other employees of the company, and by the officers thereof. A. had once before been kicked by the same mare, but had not asked to have her taken from under his care. At the time of the accident A. was not using a strap which he ordinarily used when grooming the mare to prevent her from kicking. In an action by A. against the company to recover damages for the injury done him, *held*, that the plaintiff was not entitled to recover. *Id.*

16. In an action against a street-car company for an injury occasioned by the kick of a vicious mare belonging to the company defendant, evidence is admissible in order to show that the company knew of the vicious character of the animal, that the stable boss was possessed of such knowledge, and had had a conversation with the superintendent of the company relative to the sale of the mare. *Id.*

17. A servant of a railway company, to recover of the company for a personal injury growing out of alleged negligence on the part of the company, must have used ordinary care on his part, considering his surroundings—that is, such care as a man of ordinary prudence would usually exercise under the same or like circumstances. *Wabash, etc., R. R. Co. v. Elliott*, 651.

18. It is not the province of the circuit court to determine, in an action to recover for an injury occasioned by the alleged negligence of the defendant, what circumstances will be sufficient to charge a plaintiff with want of ordinary care,

MASTER AND SERVANT—Continued.

and thus prevent a recovery by him. Therefore, an instruction which directs the jury, in substance, what circumstances will show or constitute a want of ordinary care in the plaintiff, is properly refused. *Id.*

See NEGLIGENCE, 4, 5, 9, 18.

MATERIAL, PURCHASE OF, 114.

See PLEADING AND PRACTICE, 9.

MINOR, INJURY TO WHILE IN SERVICE OF RAILROAD, 528.

See NEGLIGENCE, 2-5, 7.

MORTGAGE.

1. An issue of bonds secured by a first mortgage and issued for the purpose of taking up others of a prior issue, was larger than necessary for that purpose. In a suit brought by holders of a second mortgage to foreclose their mortgage, *held*, that such surplus bonds, whether actually out and in the hands of bona-fide holders when the second mortgage went into effect, or issued afterwards for the first time, as collateral, to secure a debt contracted at the time they were thus pledged—in either case, they were secured by such first mortgage equally with those applied to the purpose of the issue, even though, in the second case, such pledgee had full knowledge of all the facts. *Clafin v. South Carolina R. R. Co.*, 281.

2. Construing the language of the instrument with reference to the surrounding circumstances and the subject-matter of the contract, *held*, first mortgage bonds remaining unissued in the hands of the company, and those which afterwards came into their hands by purchase, without the intention of retiring them, could be issued, sold, and transferred by the company, after the date of the second mortgage, so as to carry a lien under the first mortgage. *Id.*

3. A second mortgage, made to secure the payment of an issue of 6000 bonds, of \$5000 each, recited that the proceeds thereof were "to be applied exclusively to the extinguishment of the floating debt and the retirement of unsecured bonds." The manner of effecting this extinguishment was not provided for, further than by authorizing the president of the company to sell the bonds at not less than 80 per cent which might be for one third cash and two thirds in unsecured bonds, at not less than 80 per cent. *Held*:

(1) In a controversy between bondholders, that bonds of this issue, even if pledged as collateral upon an extension or renewal of the floating debt, or to secure notes given in payment of unsecured bonds, were regularly issued and properly applied.

(2) Directors acting in good faith for the best interests of the company are entitled to the same rights as other creditors.

(3) Outstanding unsecured bondholders are not entitled to participate in the security of the second mortgage without first complying with the terms dictated by the company.

(4) Bonds purchased by the company with the proceeds of second mortgage bonds should be delivered up and cancelled.

(5) An attachment regularly issued in the State of Georgia is superior to the lien of a mortgage defectively recorded. *Id.*

4. On May 1st, 1871, three railroad companies that were associated together for the purpose of building and running their several roads as one continuous line, executed a mortgage deed of their several roads and of all the personal property and income thereof, together with all their corporate rights, in trust, to secure the payment of their joint bonds to the amount of \$2,800,000. The bonds were executed, and sold or pledged. On April 1, 1874, the same companies executed a second mortgage of the same property to the same trustees, to secure the payment of their joint bonds to the amount of \$1,770,000. Bonds to the amount of about \$125,000 were issued thereunder. On January 1, 1875, those companies, with others, executed a mortgage of all the property of their several roads, including the property conveyed by the previous mortgages, to other trustees, in trust, to secure the payment of their joint bonds to the amount of \$9,500,000. Bonds to the amount of about \$80,000 were issued thereunder. On July 18, 1876, the proceeds of all the bonds so issued being expended, and

MORTGAGE—Continued.

the companies being insolvent and still in need of funds to complete their roads, the first-mentioned companies executed a fourth mortgage of the property conveyed by the first mortgage to one of the trustees in the first and second mortgages, in trust, to secure the payment of their joint bonds to the amount of \$500,000. That mortgage provided, among other things, that no bonds should be issued thereunder until holders of the first-mortgage bonds to the amount of \$1,800,000 had first signed an agreement whereby they should severally agree that, for the purpose of completing the roads and paying the interest on certain debts, said companies might issue such bonds, "to be denominated preference bonds," which should constitute and be a lien "on the property conveyed by such mortgage prior to the bonds held by" the several signers thereof. Such an agreement was signed by holders of first-mortgage bonds to the amount of about \$1,870,000. A bill was brought by the trustee under the last mortgage for a foreclosure thereon; and a cross-bill was brought by the trustees under the first mortgage for a foreclosure thereon. Both bills prayed for a settlement of priorities, and for general relief. *Held*, that the agreement operated an equitable mortgage or pledge of the interest under the first mortgage of those who signed, as security for the payment of the preference bonds; but that it in no way affected the interest, or the priority of the lien, of those who did not sign. *Poland v. Lamaille, etc., R. R. Co., 408.*

5. Each mortgage provided that until default in payment of bonds or interest thereon or default in regard to something by them agreed to be done, etc., the mortgagors should have possession of their roads and take the income, etc., thereof, but that in case of default for four months after demand, and on request of certain bondholders, the trustee or trustees therein named should take possession of the roads, and operate the same, and take the income thereof, and pay, first, the expenses of operating, etc. Default was made in the payment of interest on the bonds, but none of the trustees took possession. But one of them filed a bill, as aforesaid, alleging that the roads were largely indebted to many persons who were not secured, and that, if they remained in the hands of the mortgagors, all the income and personal property thereof would be taken for the payment of such debts, and diverted from the payment of interest on the bonds; and praying that all the bondholders, companies and trustees be made parties, and that receivers be appointed to operate the roads under order of court until final decree should be made. Receivers were accordingly appointed. Those who before the appointment of receivers had sold oil to the mortgagors for use in operating the roads, and had performed services for them as mechanics for like purposes, thereupon filed a cross-bill alleging their debts, and praying that an account be taken thereof and of all like debts due to others who might come in, etc., that the receivers be ordered to pay them out of the income of the roads, and forbidden to pay any portion of the income to bondholders until they had paid them, and that their debts be decreed to be a first lien on all income, furniture, cars, engines, etc. *Held*, that, as the orators in the cross-bill were seeking as a class to enforce a common right against a common fund, they had proper standing in court, and the bill was not multifarious; that under ss. 101, 103, c. 28, Gen. Sts., the orators in the cross-bill had a legal right to attach the chattel property of the companies, to which the liens of bondholders were subordinate; that the appointment of receivers altered no existing right, as the receivers held for all interested parties, the orators in the cross-bill, as well as the bondholders; that the court, having taken jurisdiction, would retain the cause for final determination of all questions arising on the claims of any interested party; and that the receivers should be made chargeable as holding the chattel property subject to such creditors' rights. *Id.*

6. Each mortgage was upon trust, among other things, that until default, and while the mortgagors remained in possession and operated the roads and took the income, as aforesaid, they should apply the income "to the payment of the current expenses of the road . . . or dispose of the same for the lawful uses" of the mortgagors. The net earnings were in part expended in making new road to the enhancement of the value of the mortgaged property; and the chattels of the several roads were lessened in value by use in the making of income.

MORTGAGE—Continued.

space for engine and car houses and other railroad accommodations, to which the company at the time of the purchase had a right and expected to build their road; and such incumbrance will continue though the road is not built to such land, and the right to use them in direct connection with the road, without further legislative authority, has expired. The case of a railroad holding more property for its own purposes than its present needs demand is entirely different from one in which the company buys other property distinct from the road or its appurtenances, not intended or necessary for the present or prospective exercise of its franchise, and therefore not within the purview of the mortgage. *Hamlin v. European, etc., R. R. Co.*, 504.

18. The mortgage attached to the right to a deed of such lands under contract and continued to attach to it as the right grew in value, whether the increased value arose from payments and improvements made by the company or by a new consolidated company which took the entire property and assumed the debts of the first company. *Id.*

19. The interest conveyed by an assignment to secure the assignee against loss from liability as an indorser is commensurate only, in degree and duration, with the liability it secured. *Id.*

20. When a mortgage is given by a railroad company on its franchises and on its roads to be thereafter built, and a branch road, not in contemplation at the date of such encumbrance, is afterwards laid and built, such branch road will pass under such mortgage, subject to the burdens put upon it by the company in the course and as incidents of its acquisition. *Coe v. Delaware, etc., R. R. Co.*, 514.

21. The complainant was the holder of a first-mortgage bond of the defendant, and agreed to come in under a plan to reorganize the defendant by force of the statute; the bill alleged that the defendant, as reorganized, was about to issue to the other holders of such first-mortgage bonds, its own bonds, but did not show that such new bonds were to be secured by a mortgage. *Held*, that such statements did not lay a ground for equitable jurisdiction. *Midland R. R. Co. v. Hitchcock*, 523.

22. But as the bill alleged that defendant would not disclose to complainant what the plan of reorganization was, *held*, further, that the right of such discovery laid a sufficient foundation to the suit. *Id.*

See **BOND**, 4; **CONSTITUTIONAL LAW**, 2; **CORPORATION**, 12-29; **RECEIVER**, 8-10, 14.

MUNICIPAL CORPORATION.

1. The power in a municipal incorporation to make contracts and expenditures carries with it the implied power to incur indebtedness, and to issue proper obligations therefor. *Hopper v. Covington*, 251.

2. But such implied power does not confer upon it authority to issue commercial security bearing all the incidents of commercial paper. *Id.*

3. When a municipality or its officers are invested with authority to issue bonds and to decide whether the condition exist under which a special enactment authorizes the issue of such securities, and such officers issue bonds reciting the existence of the necessary conditions, the recital is itself a condition which is conclusive against the municipality in favor of a bona-fide holder. *Id.*

4. But in a suit on a coupon where a copy of the bond from which it was detached is not made a part of the complaint; or where the complaint does not contain any allegation as to the bond's tenor and effect, the purpose of its issue, or the authority for it, the complaint is bad on demurrer. *Id.*

5. There is no presumption that the bond from which the coupon was cut was issued in pursuance of an act of the legislature, and that all the necessary conditions requisite to its issue had taken place previously thereto, where such bond does not contain a recital of the conditions necessarily precedent to its issue. *Id.*

See **EMINENT DOMAIN**, 1-5; **STREET RAILWAY**, 1-10.

NEGLIGENCE.

1. A lad who was employed by a coal dealer was engaged in unloading cars standing upon a siding constructed by the dealer upon his own land. By reason of the neglect of the railroad employees to change the switch leading to the siding from the main track, several cars were propelled from the main track upon the siding, and colliding with the cars on which the lad was employed, he received injuries from which he lost his leg. In a suit against the railroad company for damages, *held*, that the lad was employed on or about the company's road within the very terms of the Act of April 4th, 1868, and could not recover. *Cummins v. Pittsburg, etc., R. R. Co., 524.*

2. In a suit for damages against a railway company by a mother for killing her minor son, whilst in its employment as a brakeman, the court excluded her testimony to the effect that she remonstrated with the son about his acting as brakeman, and also her answer to a question asking her what she said on that subject. *Held—*

1. The mother having already testified that she had not at any time consented to his employment, what she said to him would have been immaterial as to the fact of consent, and inadmissible to charge the company with notice of her objection, because not made in the presence or with the knowledge of any of its officers.

2. If the issue had extended to her entire conduct during the employment, and the inference reasonably drawn therefrom, the fact of her remonstrance with the son, and the manner thereof, would have been proper as explanatory of her conduct. *Hamilton v. G. H., etc., R. R. Co., 528.*

3. A railway company contracted with a boy fifteen years old for his services as brakeman on its railway without the consent of the mother, his only living parent. *Held—*

1. The employment was a wrong done the mother.

2. Unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been, the contract with him would not place him in the position of an employee or preclude a recovery for injuries suffered from the negligence of co-employees. *Id.*

4. Though a minor may be of sufficient age and discretion to justify his employment as a brakeman, whether he could be thus properly employed or not is a question for the jury. *Id.*

5. In an action by a minor, seven years old, against a railroad company, to recover damages for an injury alleged to have been occasioned by the negligence of defendant's servants, plaintiff offered to prove that he being on a sand-car standing on a switch within the city limits, the car was moved a few yards, and that while the car was in rapid motion the conductor ordered him off, in obeying which order the plaintiff was injured:

Held, that the plaintiff being a trespasser, the offer did not contain any evidence of negligence on the part of defendant, and that therefore the same was properly rejected. *Cauley v. Pittsburg, etc., R. R. Co., 533.*

6. An offer to prove a fact which can only exist by the suspension of natural laws should not be received. *Id.*

7. An eight-year-old boy trespassing upon the premises of a railroad company got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started at that moment and the tender passed over his arm. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. *Held*, that the railway could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago, etc., R. R. Co. v. Smith, 535.*

8. The removal of trespassers from the cars is within the implied authority of the company's servants on the train, and the fact that they acted illegally in removing a party while the train was in motion does not exonerate the company. *Hoffman v. N. Y., etc., R. R. Co., 537.*

NEGLECT—Continued.

9. In an action by a parent against a railroad company for negligently causing the death of his infant child, he is entitled to recover only for the pecuniary injury he has sustained. The proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses and medical services. *Pennsylvania Co. v. Lilly*, 540.

10. In such action, to enable the parent to recover full damages for the services of the child during his minority, such damages must be specially averred and demanded in the complaint. *Id.*

11. Where, in such case, the complaint did not aver and demand damages for the loss of the future services of the child, and there was no evidence tending to show a loss of such services to the parent, a verdict assessing his damages at \$1,800 is excessive. *Id.*

12. Where a fact is established in a cause by evidence, the jury may properly be allowed to draw therefrom such inferences as are logically deducible from it. Thus if it be shown that the driver of a car was asleep or intoxicated at the time of an accident, a presumption of negligence would properly arise. But the fact from which such inference is to be drawn must first be established. It will not do to presume that he was in that condition from some remote fact, in no way connected with the case, and upon this presumption base the additional presumption of his negligence. A presumption should always be based upon a fact, and should be a reasonable and natural deduction from that fact. *Phila., etc., Ry. Co. v. Henrice*, 544.

13. A child of tender years was injured by a passenger railway car. The court permitted plaintiffs to ask a witness how many hours the drivers and conductors on the railway were employed each day, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident. *Held*, that this was error. *Id.*

14. The court charged that if the driver saw the child in the street approaching the car, and in such close proximity that it might reach the track before the car passed, it was negligence on his part not to stop. *Held*, that this was error; that the standard of duty in such a case was a shifting one and for the jury. *Id.*

15. Negligence in injuries inflicted by railroad trains upon individuals is a question that depends upon the circumstances and can rarely, if ever, be absolutely defined as matter of law; and in determining whether there has been negligence all the circumstances must be considered together. *Marcott v. Marquette, etc., R. R. Co.*, 548.

16. The care required of all persons doing business involving danger must be such as is reasonably calculated to avoid serious consequences therefrom, so that if there are such consequences they may be considered as accidental only. *Id.*

17. In an action for negligent injury negligence which did not contribute to the injury need not be regarded.

18. The lookout upon a locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual. *Id.*

19. It is a question for the jury whether a special train can be run without negligence at such a speed as to make it difficult to check its speed within a reasonable time and distance. *Id.*

20. A railroad train ran over a child on the track. It appeared that there were visitors in the cab of the engine, and that the presence of strangers without leave was prohibited by rule. *Held*, that it was proper for the jury to consider the fact with other circumstances as bearing on the question of negligence. *Id.*

21. Where a child two years old strays away from his home, without the knowledge or consent of his parents, and goes upon a railroad track, which is about 100 feet from his home, and within three minutes after leaving his home is injured by a car, belonging to the railroad company, running over him, *held*,

NEGLIGENCE—Continued.

that it cannot be said, as a matter of law, that the failure of the parents to keep the child away from the railroad track was per se culpable negligence contributing to the injury. *Smith v. Atchison, etc., R. R. Co.*, 554.

22. Where a railroad track is constructed in a populous neighborhood near a city, and children and others often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened, and the persons operating the road loosen the brakes of a car loaded with coal, and let it run down this steep grade, without any person being on the car, or without any means of stopping it, and without first looking to see whether the track was clear or whether any person was on the track or not, and a child who was on the track was run over and injured, and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road before they loosened the brakes, *held*, that the courts cannot say, as a matter of law, that the persons operating the road were not guilty of negligence; but it is a question of fact which should be submitted to the jury. *Id.*

23. Where a railroad company owns a switch track constructed from the main track to a coal shaft belonging to a mining company, and the railroad company furnishes cars to this mining company to be loaded with coal, and when loaded permits the mining company to loosen the brakes of the cars so that the cars will run down the steep grade of the switch track to a point where the track is level, and the mining company, after loading a certain car, negligently loosens the brakes thereof and allows the car to run down the steep grade of the switch track and over a child, and thereby injures it, *held*, that the railroad company is responsible for the injury. *Id.*

24. A railroad company is bound to provide for a careful lookout in the direction in which a train is moving, in places where people, and especially where children, are likely to be upon the track. *Townley v. Chicago, etc., R. R. Co.*, 562.

25. Although the statute (section 1811, Rev. St.) makes it unlawful for a person, not connected with or employed upon a railroad, to walk along the track thereof, "except when the same shall be laid along public roads or streets," yet, where the question is whether a person, injured while walking upon a railroad track, was guilty of a want of ordinary care, it is error to reject evidence showing that many persons, men, women, and children, had, for years before the accident in question, been in the habit of passing, daily and hourly, up and down, in the same pathway on which the injured person was passing—since such testimony would tend to show a license, or to repel the inference of a want of ordinary care, and also to show a lack of such care on defendant's part as the facts required. *Id.*

26. Ordinary care is such care as would ordinarily be exercised by persons of the age and in the situation of the person sought to be charged with negligence; and the fact that the person injured was a child of tender years is to be considered in determining the question of contributory negligence. *Id.*

27. Railroad companies are not liable for injuries inflicted by passing trains upon persons walking upon the tracks of the company. Nor does it make any difference that those persons are of tender years. Companies owe no greater measure of duty to them than to adults. *Moore v. Pennsylvania R. R. Co.*, 569.

28. In an action by parents against a railroad company to recover damages for the death of their child, they proved that the deceased was killed by a fast express train while walking upon the track of the company, defendant's road. The child was nearly ten years of age and was bright and intelligent. The court, on application of the defendant company, granted a non-suit. *Held*, on error, that this was not error. *Id.*

29. What constitutes negligence is generally a question of fact, and as such is usually submitted to the jury; the courts being reluctant, where the facts are complicated, and inferences are to be drawn, and the evidence is contradictory, to withdraw such questions from their decision. *Baltimore, etc., R. R. Co. v. Stansbury*, 574.

30. But it being the province of the court to determine the legal sufficiency of evidence, it sometimes becomes their duty (where the main facts are uncon-

NEGLIGENCE—Continued.

troverted) to decide whether the facts offered in evidence are such as would constitute such negligence in law as would debar the plaintiff's right to recover. *Id.*

31. Where the uncontroverted evidence proved that the deceased (to recover damages for whose death the defendant was sued) was improperly on the track of the defendant, that he voluntarily exposed himself to the peril, with full knowledge of the risk, and might, if he had used his eyes and ears, have seen and heard the approaching train, long before it struck him; and the only material conflict of evidence, was as to the giving of the signals upon the approach of the cars, it was *Held*:

That the deceased, having directly contributed to his own death, the plaintiff had no cause of action, and it was error to reject a prayer of the defendant to that effect. *Id.*

32. When the petition charges negligence as the plaintiff's ground of action, and there is no question of unskillfulness on the part of the defendant raised either by the petition or the plaintiff's evidence, the plaintiff is not entitled to an instruction as to the effect of unskillfulness on the part of defendant. *Bell v. Hannibal, etc., R. R. Co., 580.*

33. Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court; where they are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts. *Id.*

34. The requirement of section 806, Revised Statutes, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway. *Id.*

35. The statute does not require that these warnings shall be continued until the train has passed the crossing, but only until the engine has passed. *Id.*

36. An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business. *Id.*

37. The mere fact that a train was moving at a dangerous rate of speed, will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence. *Id.*

38. It seems that a person riding on a freight train on which passengers are allowed to be carried, is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain. *Sherman v. Hannibal, etc., R. R. Co., 589.*

39. It is well settled that to make the master liable for the tortious act of his servant, the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Upon this principle, where the conductor had exclusive control of a railroad train and of all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured; *Held*, that the railroad company was not liable. *Id.*

40. The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants. *Id.*

41. If a passenger on a freight train is injured while simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not

NEGLIGENCE—Continued.

conspicuously posted as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an authorized service for the company. *Id.*

42. A lad about ten years of age was forcibly put on board of a freight train by its brakeman, and against his will was carried for a distance of five miles. He returned home on foot, running most of the way, and was taken sick and became permanently crippled in both legs. *Held*, that the action of the brakeman was a trespass, and if the conductor of the train was present, and directed or consented to the acts of the brakeman, they were joint trespassers, and if the sickness resulted directly from their acts they were liable in an action of trespass. *Drake v. Kielly*, 592.

43. The plaintiff was requested by a brakeman of the defendant company to ascend a moving car of the defendant and set a brake, which he did, and while so engaged he was injured by other servants carelessly running other cars against the one he was upon. *Held*, That he could not recover of the defendant the damages he had sustained. *Everhart v. Terre Haute, etc., R. R. Co.*, 599.

44. A mere volunteer cannot recover damages he may have sustained by the carelessness of the servants of the person whom he has volunteered to aid. *Id.*

45. If a parent permits a young child, without sufficient discretion to get out of the way of a running train, to go alone upon a railway track, this is prima facie evidence of negligence, and he cannot recover against the company for the death of the child from the running of the train, unless the trainmen, after discovering the child, omitted to use reasonable precaution to avoid the collision. *St. Louis, etc., R. R. Co. v. Freeman*, 608.

46. The fact that a child under the age of discretion is upon a railroad track, where trains are frequently passing, without a proper attendant, is only prima facie evidence of negligence in a parent, and is subject to explanation; and it is for the jury to determine from the evidence, whether the explanation is sufficient to repel the presumption of negligence. *Id.*

47. For parents living near a railroad where trains are frequently passing, to leave a child at their house, too young for discretion, and without an attendant of sufficient discretion, and without any precaution to prevent its escape from the house, is gross negligence; and if the child gets upon the track and is killed, the company is not responsible to the parent, unless the trainmen, after discovering the child, omit the use of reasonable precaution to avoid the injury. *Id.*

48. A parent may recover of a railroad company damages for the loss of future services of a child negligently killed by its train. *Id.*

49. Where injuries received by a child from a running train would not prove fatal but for the want of reasonable care of the parent after the injury, he cannot aggravate his damages against the company beyond damages for the wounding, etc. *Id.*

50. The measure of damages to a parent for killing his child is the pecuniary value of his services during minority, and the cost and expense incurred by the parent on account of the injury, less the reasonable and necessary expense of raising it; the value to be such as is ordinary with children in like condition and station in life, without regard to the relationship between them or to the parent's feelings or the child's sufferings. *Id.*

51. In charging as to the contributory negligence of the father of plaintiff's intestate, the court stated that the railroad being on a street, all persons had prima facie a right to be on the street for all lawful purposes, and that this fact ought to impose on the driver and conductor of a street car extraordinary vigilance in looking out for dangers and guarding against accidents and injuries to persons and things. *Held*, that the latter portion may be regarded as a mere passing remark made when the judge was not charging in reference to defendant's negligence. *Etherington v. Prospect Park, etc., R. R. Co.*, 617.

52. The court charged that if the driver was paying attention to his horses and had control of them and the car, and was looking out and attending to his business, and did not see the child in time to stop the car before running over her, he was not guilty of negligence, and defendant not liable. *Held*, that this

NEGLIGENCE—Continued.

gave the jury a plain rule applicable to the facts of the case, and if defendant wished a fuller charge it should have requested it. *Id.*

53. A person has a right to cross a railroad track anywhere within the bounds of the highway. A child, nine years old, while attempting to cross the track, caught his foot between the rails, and was injured by a train which was backing. He was not seen by the employees on the train in time to stop before reaching him. *Held*, that it was negligence on the part of railroad company in failing to keep a proper lookout. *Louisville, etc., R. R. Co. v. Head*, 619.,

See **MASTER AND SERVANT**; **PLEADING AND PRACTICE**, 16, 26, 29-33; **RECEIVER**, 8.

NOTICE, 388, 439.

See **MORTGAGE** 8; **STOCK**, 25.

NOVATION, 312.

See **PLEADING AND PRACTICE**, 17.

NUISANCE, 129.

See **STREET RAILWAYS**, 5.

PARENT AND CHILD.

See **NEGLIGENCE**, 2-5, 7-9, 12-14, 20-23, 26-31, 41, 43, 52.

PAROL EVIDENCE, MODIFYING WRITTEN CONTRACT, 371.

See **STOCK**, 36.

PASSENGER, WHO IS, 589.

See **NEGLIGENCE**, 38.

PAVING STREET, 161.

See **STREET RAILWAY**, 11-13.

PLEADING AND PRACTICE.

1. The trial by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury. *Barton v. Barbour*, 1.

2. It is not necessary to set forth in the petition the minute details of a contract on which suit is brought, to authorize its introduction in evidence. It is sufficient if it sets forth the contract according to its true and legal import and effect, as a whole. *Wooters v. International, etc., R. R. Co.*, 100.

3. When suit is brought on a contract, which on its face refers to a contingency, on the happening of which the defendant should be discharged from liability, it does not devolve on the plaintiff to anticipate the defence, by averring that the contingency had not happened; but if the defendant relies on it as a defence, he must allege and prove that it did happen. *Id.*

4. Declarations, representations and expressions of opinion, which precede, but do not enter into or form a part of the contract as finally consummated, furnish no ground for the recovery of damages to a party deceived or misled by them; for it is his own folly to rely on them when they are not embodied in and made a part of the contract. *Id.*

5. A corporation of one State by carrying on business in another State, e. g., by leasing the property and franchises of a corporation of that other State, does not thereby become a citizen of that other State. *Baltimore, etc., R. R. Co. v. Koontz*, 105.

6. Therefore a Maryland railroad company which leases and operates the property of a Virginia railroad company does not thereby become a citizen of Virginia, or lose its right to a removal of the cause when sued in a Virginia State court. *Id.*

7. In a removal cause the jurisdiction of the Federal court attaches as soon as it becomes the duty of the State court to proceed no further; and the entry of the record in the Federal court is necessary simply to enable that court to proceed with the cause, but not for the transfer of jurisdiction. *Id.*

PLEADING AND PRACTICE—Continued

8. If the party petitioning for a removal is kept in the State court against his will and forced into a trial, he may remain in the State court, carry his case up regularly until he obtains a reversal of the judgment and an order for the allowance of the removal, and then enter his case in the Federal court, notwithstanding the fact that, pending these proceedings, the first term of the Federal court after the filing of the petition for removal had elapsed, and the party petitioning for removal had not filed his copy of the record at that term. *Id.*

9. In an action to recover the value of certain railroad iron bought for defendant and used in an extension of the company's track, without protest or dissent from the board of directors. *Held*, the directors using the material purchased were bound to inquire, and presumed to know, whether it was paid for or not, and it was not essential to an adoption of the act of the officer that the directors should know the terms of his contract. A witness having been examined on the cross-examination as to new matter, not growing out of the testimony he had given, it was proper to endeavor to refresh his memory and correct his recollection by producing and showing to him his own letters relating to the subject-matter of the inquiry. Letters from the general office of the company, and written by its secretary, in reference to the iron were admissible as part of the *res gestæ*. *Scott v. Middletown, etc., R. R. Co., 114.*

10. Statutes of limitations are to be construed strictly and will not be extended by implication. *Dist. of Columbia v. Washington, etc., R. R. Co., 161.*

11. To arrive at the correct meaning of a statute the court will examine its language throughout and will import words from all portions of it to qualify the meaning of the whole. *Id.*

12. As respects public rights municipal corporations are not within ordinary limitation statutes. *Id.*

13. Under the second section of the Revised Statutes relating to the District of Columbia, the liability of the District to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it "a body corporate for municipal purposes," and, in the absence of any provision to the contrary, whatever liabilities may properly attach to municipalities in general, are equally devolved upon the District government. Hence, whenever the Maryland act of 1715, ch. 23, which is the statute of limitations in force in this District, may be interposed to a claim of an ordinary municipality, it may be availed of against the District of Columbia. *Id.*

14. Charges or assessments made against property-owners for street improvements, by a municipality having power so to do, are in the nature of taxes and in the absence of some additional provision declaring limitation a bar, such a plea is no defence. *Id.*

15. Where, on the failure of the companies to pave, etc., as required by their charters, the work is done by the District, assumpsit for the recovery of the sum expended is a more appropriate form of action than debt; and the declaration should charge that the sums paid were what the work was reasonably worth, the recovery being limited to such reasonable expenses incurred by the city as shall be ascertained by a jury. Extravagant amounts recklessly expended in the work, without reference to its value, should not be allowed. *Id.*

16. An action based upon a written contract itself can only be brought against the party named in the instrument; hence, an action of assumpsit cannot be maintained against a railroad company, based upon a written contract, signed by, and in the name of, the trustees of the mortgage bondholders of such road. *Chaffee v. Rutland R. R. Co., 212.*

17. There could not be a novation of parties in this case, because the trustees had bound themselves,—not binding the company,—and one of them was also president of the defendant company; and, acting in this double capacity, he could not contract with himself; could not discharge himself and put the company in his place. *Id.*

18. A Court of Chancery could charge upon the trust property the legitimate expenses incurred in managing it: but not even this upon the bondholders personally. *Id.*

19. Distinction between the powers of an agent and trustee. *Id.*

NEGLIGENCE—Continued.

gave the jury a plain rule applicable to the facts of the case, and if defendant wished a fuller charge it should have requested it. *Id.*

53. A person has a right to cross a railroad track anywhere within the bounds of the highway. A child, nine years old, while attempting to cross the track, caught his foot between the rails, and was injured by a train which was backing. He was not seen by the employees on the train in time to stop before reaching him. *Held*, that it was negligence on the part of railroad company in failing to keep a proper lookout. *Louisville, etc., R. R. Co. v. Head*, 619.

See **MASTER AND SERVANT**; **PLEADING AND PRACTICE**, 16, 26, 29-32; **RECEIVER**, 8.

NOTICE, 368, 439.

See **MORTGAGE** 8; **STOCK**, 25.

NOVATION, 212.

See **PLEADING AND PRACTICE**, 17.

NUISANCE, 129.

See **STREET RAILWAYS**, 5.

PARENT AND CHILD.

See **NEGLIGENCE**, 2-5, 7-9, 12-14, 20-23, 26-31, 41, 43, 52.

PAROL EVIDENCE, MODIFYING WRITTEN CONTRACT, 371.

See **STOCK**, 36.

PASSENGER, WHO IS, 589.

See **NEGLIGENCE**, 38.

PAVING STREET, 161.

See **STREET RAILWAY**, 11-13.

PLEADING AND PRACTICE.

1. The trial by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury. *Barton v. Barbour*, 1.

2. It is not necessary to set forth in the petition the minute details of a contract on which suit is brought, to authorize its introduction in evidence. It is sufficient if it sets forth the contract according to its true and legal import and effect, as a whole. *Wooters v. International, etc., R. R. Co.*, 100.

3. When suit is brought on a contract, which on its face refers to a contingency, on the happening of which the defendant should be discharged from liability, it does not devolve on the plaintiff to anticipate the defence, by averring that the contingency had not happened; but if the defendant relies on it as a defence, he must allege and prove that it did happen. *Id.*

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PLEADING AND PRACTICE—Continued

8. If the party petitioning for a removal is kept in the State court against his will and forced into a trial, he may remain in the State court, carry his case up regularly until he obtains a reversal of the judgment and an order for the allowance of the removal, and then enter his case in the Federal court, notwithstanding the fact that, pending these proceedings, the first term of the Federal court after the filing of the petition for removal had elapsed, and the party petitioning for removal had not filed his copy of the record at that term. *Id.*

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18. A Court of Chancery could charge upon the trust property the legitimate expenses incurred in managing it: but not even this upon the bondholders personally. *Id.*

19. Distinction between the powers of an agent and trustee. *Id.*

PLEADING AND PRACTICE—Continued.

20. The plaintiff, being a stockholder in the defendant company, is charged with knowledge of the capacity in which the trustee was acting. *Id.*

21. A petition by a guardian alleged that his wards were owners in fee simple of a certain woodland; that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used, and possessed for its own use, and without any authority whatever, by a certain railroad company, which company was afterwards consolidated with other railroad companies, under and by the name of the defendant, and that by reason of the conversion by said first-named company his wards were greatly damaged, etc., praying judgment against the consolidated company, etc. *Held*: That, on demurrer, the petition stated sufficient facts to constitute a cause of action for the conversion of personal property. *Lake Shore, etc., R. R. Co. v. Hutchins, 219.*

22. Where a discretionary power to sell lands is given by a will to the testator, such discretion cannot be delegated. But where an attorney in fact of such executor assumes to make such sale, the subsequent receipt of the purchase money, by the executor, is an adoption and ratification of the sale, and is equivalent to the exercise of the discretion by the executor himself. *Id.*

23. A judgment determines the rights of the parties according to the facts stated in the pleadings; and if, after issue joined, a change takes place in the rights of the parties, it must be shown by supplemental pleading, otherwise it should be disregarded. *Id.*

24. In an action for the conversion of chattels against an innocent purchaser from a person who had previously converted the property to his own use, and had afterward added to its value by his own labor, the measure of the damages is the value of the chattels when first taken from the owner, whether the first taker was a wilful or an involuntary trespasser. *Id.*

25. A foreign corporation sued in this State cannot avail itself of the statute of limitations; and this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this State, and has property and officers therein. *Boardman v. Lake Shore, etc., R. R. Co., 261.*

26. A suit brought by a widow under the act of 1871, ch. 78, for injuries causing the death of her husband, may be dismissed by her over the objection of the children of the deceased. *Greenlee v. E. T., etc., R. R. Co., 351.*

27. The refusal of a witness to answer a material question should not be permitted by the officer taking depositions. *Houston v. T. C. R. R. Co., 444.*

28. The question whether a deposition should be excluded because of the failure of a witness to answer a question, is to a large extent left to the discretion of the court; it should not be excluded for any casual omission to answer an unimportant question. *Id.*

29. A question on cross-examination of a witness for defendant as to his relationship with an officer of defendant, is admissible in the discretion of the judge. *Hoffman v. N. Y., etc., R. R. Co., 537.*

30. A statement by the judge in his charge that plaintiff was "a very intelligent, and, I think, truthful youth—I mean so far as a desire to tell the truth is concerned," is not erroneous; that he did not thereby take the question of plaintiff's credibility from the jury. *Id.*

31. Rulings cannot be made on error, on questions of fact, or on questions of law that have not been decided against the plaintiff in error, and if such rulings were made, they could not bind the action of the jury on a new trial. *Marcott v. Marquette, etc., R. R. Co., 548.*

32. Courts cannot assume that witnesses whom they must credit will be followed by the jury, and no matter how dissatisfied a court may be with the conclusions of the jury, it cannot usurp their functions. *Id.*

33. The answer denying the plaintiff's right to sue as guardian, and no evidence having been offered of her appointment as such, so far as the record shows, the judgment in her favor is, for that reason, reversed. *Sherman v. Hannibal, etc., R. R. Co., 589.*

34. A certificate to the bill of exceptions, stating that "the foregoing is the

PLEADING AND PRACTICE—Continued.

substance of all the testimony given on the trial," held sufficient to show that there was no other evidence to justify the nonsuit. *Townley v. Chicago, etc., R. R. Co.*, 563.

See CARRIER, 1; CONSTITUTIONAL LAW, 1; CORPORATION, 1, 2, 23; DEPOT, 1; MORTGAGE, 10, 12-16, 21, 22; MUNICIPAL CORPORATION, 4; NEGLIGENCE, 6, 9-17, 25, 28-33, 47, 49, 50, 51; RECEIVER, 1-7, 10, 12, 15; STREET RAILWAY, 15, 16, 38; STOCK, 38.

PLEDGE OF BONDS, 409.

See CORPORATION, 15-18; MORTGAGE, 4; — OF STOCK, 371; STOCK, 35.

POWER TO CONTRACT DEBT, 86.

See RECEIVER, 12.

PREFERRED STOCK, 265.

See STOCK, 1-14.

PRESIDENT, 294.

See CORPORATION, 14.

PRIORITY AMONG HOLDERS OF MORTGAGE BONDS, 409.

See MORTGAGE, 4.

PROMISSORY NOTE, 293.

See CORPORATION, 13.

PUBLIC AGENT, 86.

See RECEIVER, 11.

RECEIVER.

1. The general rule that a receiver cannot be sued without leave of the court by which he was appointed, applies to suits brought against him to recover a money demand, or damages, as well as to those the object of which is to take from his possession property which he is holding by order of the court.

2. The fact that a receiver is in possession, and is by the order of court engaged in the business of a common carrier thereon, does not take his case out of the rule that he is only answerable to the court by which he was appointed, and cannot be sued without its leave. *Barton v. Barbour*, 1.

3. No suit can be maintained against the receiver, who is by order of court conducting the business of a common carrier thereon, for injury to persons or property caused by his negligence, or that of his servants, without leave of the court by which he was appointed. *Id.*

4. If the adjustment of a demand against the receiver involves any dispute in regard to the facts on which his liability depends, or in regard to the amount of the damages sustained, a court of equity, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver, in a court of law, or direct the trial of a feigned issue to settle the contested facts. *Id.*

5. A court of equity may, in its discretion, in view both of the public and private interests involved, authorize its receiver of a railroad company to keep the same in repair, and to manage and use it in the ordinary way, until it can be sold to the best advantage of all interested therein. *Id.*

6. When the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty, by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence, or that of his servants, in the performance of their duty in respect of such property. *Id.*

7. If the holder of railroad bonds secured by trust deeds on the road, having

RECEIVER—Continued.

notice of the appointment of a receiver, and an order of court directing him on his petition to issue certificates of indebtedness, and making such certificates a prior and first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued. *Humphreys v. Allen*, 14.

8. The Vermont and Canada R. R. Co. in 1849-50 leased its railroad to the Vermont Central R. R. Co., at an annual rental of eight per centum on the cost of its construction, with a provision that, in case the rent should remain four months in arrear and unpaid, the lessor should have the right to enter upon both roads, and run the same until all rent due and growing due, while it was so in possession, should be paid by the net income. The Vermont Central Co. subsequently executed two mortgages of its roads and property, subject to said contracts of lease, to trustees, to secure first and second mortgage bonds; and surrendered possession of both roads to the trustees of the first mortgage. While they were in possession of and running the roads, default was made in the payment of rent to the Vermont and Canada Co. The Vermont and Canada Co. then brought its bill in equity, praying for a decree for the rent then due, and to be put in possession of both roads according to the terms of the contracts of lease, or else, "that the court would appoint some suitable person or persons to be the receiver or receivers, and manager or managers of said roads and property." The contracts of lease were held valid and binding by this court: the property was placed in the hands of receivers to carry out the provisions of the same; and the cause was ordered to be continued on the docket of the Court of Chancery, open to all parties thereto for further orders. Subsequently, by decrees of the said court, upon notice to, and the assent of all parties, the first and second mortgage bondholders of the Vermont Central R. R. Co. were authorized to elect annually, at meetings duly called for that purpose, a committee, consisting of two first and one second mortgage bondholder, who should advise with the receivers and managers concerning their management of the property, and audit their accounts. The bondholders elected and kept in office such a committee. The receivers and managers continued to act as such in the management of the property, and under and by the authority of various decrees of the Court of Chancery, entered by consent of the parties—the Vermont and Canada Co., and the bondholders' committee, having full notice thereof, and assenting, or failing to object thereto—issued various loans to a large amount for the purchase of equipment, and other additions to, or improvements upon, the property; securing the same upon certain equipment and the car service thereof; and negotiated said loans as receivers and managers; of all which the Vermont and Canada Co. and the bondholders' committee had notice. *Langdon v. Vermont, etc.*, R. R. Co., 33.

9. The question being as to the equitable priority of right to payment from the income, or corpus, of the property, as between the holders of the loans, so issued by the receivers and managers, on the one hand, and the Vermont and Canada R. R. Co. and the first and second mortgage bondholders on the other; and it being claimed that the specific purpose for which the receivers were appointed having been accomplished before the issuance of said loans, although the receivers had never been discharged, they were not, at the time of the issue and negotiation of said loans, strict receivers, so that said loans do not constitute receivers' debts, or affect the rights of the Vermont and Canada R. R. Co., and the first and second mortgage bondholders, to the priority of payment and security. *Held*,

10. 1. When receivers have executed the duty for which they were appointed, it is the right and duty of the party upon whose application they were appointed to see to it that they are discharged, if he would avoid the consequences of their continuing to act in that capacity. *Id.*

2. When persons act as receivers and managers, and issue negotiable obligations, as such, with the knowledge and assent of all the parties interested in the subject matter of the receivership, as against bona fide holders of such obligations, such parties are estopped to deny that they are just what they purport to

RECEIVER—Continued.

be, namely, the obligations of receivers and managers, and as such, entitled to priority of payment from the assets of the trust. *Id.*

8. It is immaterial whether they were strict receivers or not. Purchasers of the bonds, or securities, issued by them, relied upon their apparent authority, as such; and when one of two innocent parties must suffer, he shall suffer who by his own acts occasioned the confidence and the loss; he who gave the power or opportunity to do the act must bear the burden of the consequences. *Id.*

4. The first and second mortgage bondholders of the Vermont and Canada R. R. Co. having elected to avail themselves of an authority given for their benefit, and at public meetings chosen a committee to represent them in matters appertaining to the management of the property, are all bound by the acts of said committee, within the scope of its authority. The issuing of loans by the receivers and managers, as such, for the benefit and conservation of the property, was a matter within the scope of its authority to advise with the receivers and managers about, and assent to. *Id.*

5. The Vermont and Canada R. R. Co. and the first and second mortgage bondholders of the Vermont Central R. R. Co., through their committee, having full knowledge of the acts of the receivers and managers, in issuing negotiable obligations, as such, and acquiescing therein, and receiving some portion of the avails thereof, are estopped from denying that said acts are as binding upon them as the acts of strict receivers would have been; hence, as between the bona fide holders of the bonds so issued by the receivers and managers, and the Vermont and Canada R. R. Co., with its claim for rent, and the first and second mortgage bondholders of the Vermont Central R. R. Co., with their claim for interest, the former have the superior equity and must be first paid. *Id.*

6. Taking a special security is not of itself a waiver of all other security. This generally depends on the understanding of the parties when the security is given. *Id.*

7. A bill will not be dismissed for multifariousness, where the questions presented for adjudication by it, or some of them, are questions in which all the orators have a common interest, and where none of the defendants are embarrassed in making their defence, by the alleged misjoinder of parties or causes of action. *Id.*

11. Statutory receivers of railroads, to some extent, were public agents, and unless acting within the scope of their authority, the State is not bound by their acts. *State v. Edgefield, etc., R. R. Co., 86.*

12. Statutory receivers of railroads have no power to contract debts to be paid otherwise than out of the earnings of the roads. *Id.*

13. There was no obligation on the State to continue the receivership until the current indebtedness of the receivership was paid. *Id.*

14. The fact that the indebtedness created by the receiver enhanced the value of the property on which the State had a mortgage, cannot add strength to the claim. *Id.*

15. A court of chancery, by its inherent powers, may enlarge the power of its receiver, but no such power exists as to a receiver by contract. *Id.*

16. A statutory receiver of a delinquent railroad has no power to lease the road. *State v. McMinnville, etc., R. R. Co., 95.*

17. A payment of rents by the lessees, under a void lease, to an officer of the State, and the reception of such rents by such officer, would be no ratification of the void lease. The Legislature alone could ratify such void lease. *Id.*

18. There can be no recovery for improvements made upon the road by the lessees under such void lease. *Id.*

See MORTGAGE.

SHED OVER THE STREET, 128.

See STREET RAILWAY, 1-7.

SPECIAL TRAIN, 549.

See NEGLIGENCE, 19.

SPEED, DANGEROUS RATE OF, 581.

See NEGLIGENCE, 37.

STATE, LIEN OF, 460.

See CORPORATION, 29.

REMOVAL OF SUITS, 105.

See PLEADING AND PRACTICE, 5-8.

RES GESTÆ, 115.

See PLEADING AND PRACTICE, 9.

ROLLING STOCK, 488.

See MORTGAGE, 16.

ROUTE, SURVEY OF, 518.

See CORPORATION, 30

STATUTE.

1. Where a statute of this State is derived from another State, a decision of the supreme court of that State construing it, rendered after its adoption in Missouri, does not carry with it that authoritative force that it would have had if it had been rendered before the adoption. *Griswold v. Seligman*, 371.

See CORPORATION, 24, 28; EMINENT DOMAIN, 3, 4; NEGLIGENCE, 1; PLEADING AND PRACTICE, 10, 14, 25.

STOCK.

1. Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears, before the holders of common stock are entitled to anything. *Boardman v. Lake Shore, etc., R. R. Co.*, 265.

2. A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Id.*

3. When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets, including all undeclared dividends. *Id.*

4. While as a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion, where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action, and, when necessary, to restrain, by injunction, any action adverse to such right. *Id.*

5. In 1857 the M. & N. I. R. R. Co. issued certain preferred and guaranteed stock; the certificates therefor stated that the stock was entitled to annual dividends at the rate of ten per cent, payable semi-annually, at days specified, out of the net earnings of the company, and also a share pro rata with the other stock in any excess, and that the payment of the dividends was thereby guaranteed. Said company was consolidated with defendant, the latter assuming its obligations. No dividends were paid upon the said stock until 1863, and the arrears were not subsequently paid although dividends were declared and paid upon the common stock. In an action to compel the payment of the back dividends, for the purpose of showing authority for the issue of the stock, the book of minutes, containing certain resolutions of the board of directors of said M. & N. I. R. R. Co. authorizing the issue of the preferred guaranteed stock, was offered and received in evidence under the objection that the certificate was the contract and could not be varied by other evidence. *Held*, no error; that the whole proceeding relating to the issue of the stock could be taken in connection as constituting the one transaction. *Id.*

6. The resolution of the directors declared that dividends on the stock authorized to be issued should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock. *Held*, that this was in effect the contract as expressed in the certificate; and that under it the dividends were not only preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, and in case of a failure in any year to

STOCK—Continued.

earn profits sufficient to pay the dividends specified, they were to be paid as arrears before any dividends were paid upon the common stock. *Id.*

7. There was no proof of plaintiffs' title to the preferred stock except the certificate issued to plaintiffs' testator. *Held*, that in the absence of proof of the issue of other stock of this description the presumption was that plaintiffs' stock was a portion of that so authorized to be issued, and that plaintiffs were the lawful owners. *Id.*

8. Plaintiffs' testator did not become owner of the stock until 1862. *Held*, that the transfer to him carried with it all right to the unpaid dividends. *Id.*

9. The complaint asked and the judgment directed a specific performance of the contract and restrained defendant from paying dividends upon that portion of its common stock which represented the common stock of the M. S. and N. I. R. R. Co. until the amount of the arrears was paid. *Held*, no error; that plaintiff was entitled to the equitable relief granted. *Id.*

10. Also, *held*, that an action was maintainable against defendant alone as the representative of the corporation with which the contract was made. *Id.*

11. Also, *held*, that, as the claim was originally against a foreign corporation, and as the articles of consolidation by which defendant assumed the obligation took effect within six years of the commencement of the action, the statute of limitations did not run against plaintiffs' claim; also that as it did not appear that any action on the part of defendant was induced by the delay in prosecuting said claim, plaintiff was not estopped by such delay. *Id.*

12. Defendant was organized as a corporation under the statutes of several States to operate a continuous line of road running through those States which had previously been operated by the consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining States, were repugnant to the provision of the U. S. Constitution (art. 1, § 8, sub. 3), conferring on Congress the power to regulate commerce with foreign nations and among the several States. *Held*, untenable; that in the absence of any legislation by Congress upon the subject, the power so to legislate existed in the States. *Id.*

13. Also, *held*, that plaintiff was entitled to recover interest. *Id.*

14. The rule laid down by the English authorities where interest upon annuities was refused, *held*, not to apply. *Id.*

15. The mere consolidation of one railroad company with another company since the taking effect of the act of March 1, 1870, authorizing the consolidation of such companies, will not discharge or release a non-assenting subscriber of stock. *Atchison, etc., R. R. Co. v. Phillips Co.*, 326.

16. A certificate of stock in an incorporated company, contained a recital on its face that it was transferable by assignment, and on its surrender to the directors a new certificate of proprietorship would be issued to the assignee. The by-laws authorized transfers of stock, in writing, by the owner thereof, indorsed on the certificate, or on separate paper; and on the delivery thereof to the secretary, together with the original certificate of stock, for registration, new stock would be issued to the assignee. The assignee of the original stockholder, having possession of the original certificate, sued the company for the value of new stock issued to a subsequent assignee of the original holder to whom new stock had issued, without presentation of the original certificate. The plaintiff had not presented his transfer and stock at the secretary's office before the new stock issued. *Held*:

1. The company was estopped from denying that it would hold for the benefit of the holder of the certificate the amount of stock therein specified, until it was presented for cancellation and new stock issued.

2. The non-production of the original certificate of stock was notice to the company that a superior title might be in a third party.

3. Though the certificate was not the share of stock, it was constituted by the company the visible representative of it, and as between the shareholder and his assignee, the equitable, if not the legal, title would pass by a transfer of the certificate, and this, without it being recorded on the books of the company.

4. The certificate and transfer were prima facie sufficient to authorize the

STATE, LIEN OF, 460.

REMOVAL OF SUITS, 8

RES GESTE, 115.

ROLLING STOCK, 488.

ROUTE, SURVEY OF,

STATUTE.

1. Where a statute of the supreme court of the state, does not carry with it had been rendered before. See CORPORATION, 24,

STOCK.

1. Where preferred holders, although they are yet are first entitled to the including all arrears, the thing. Boardman v. L.

2. A shareholder in a its until a division has

3. When a dividend time, but until such designation by a stockholder the assets, including all

4. While as a general to the propriety of the proper exercise of the fixed by contract, and is asserted by an action action, and, when necessary such right. Id.

5. In 1857 the M. S. teed stock; the certificate dividends at the rate of out of the net earnings stock in any excess, anteed. Said company's obligations. No dividends were not subject upon the common stock, for the purpose of minutes, containing and N. I. R. R. Co. authorized and received in contract and could not whole proceeding relating as constituting the one

6. The resolution of ized to be issued should tion should be applied in effect the contract dividends were not only a specific charge upon the

STOCK—Continued.

holder to demand of the company the privileges and benefits to which the original holder was entitled.

7. In the absence of a charter or statutory provision requiring a transfer of stock on the books of the company, as between the shareholder and his assignee, to pass title as against a creditor, the interest of the creditor must be regarded as subordinate to that of the bona fide assignee.

8. The company was liable to the assignee of the original stockholder holding the original certificate. *Strange v. H. and T. C. R. R. Co.*, 338.

17. The owner of a certificate of stock in an incorporated company, placed his certificate, with a blank transfer indorsed thereon, in the hands of another for the purpose of sale; the agent filled the blank with his own name and afterwards indorsed thereon a transfer from himself to a purchaser. *Held*:

1. The original owner having given to his agent possession of the certificate with the external indicia of ownership and the right of disposal, the subsequent transfer by the agent clothed the purchaser with the apparent legal title.

2. The rights of the purchaser did not depend on the actual title or authority of the agent to sell, but upon the act of the original owner giving the apparent authority of disposal, and which would estop him and his assignee.

3. The title of the purchaser would be subject to be defeated by a superior title in the original owner, if acquired with notice of it, or without valuable consideration.

4. In the absence of statutory or charter provision, the books of the company could not operate as notice of the ownership of the stock, further than for the use and benefit of the company itself. Id.

18. A city, having subscribed to the stock of a railroad company, under the act of May 4th, 1890, authorizing cities to aid in the construction of railroads. *1 R. S. (Indiana) 1876, p. 290*, is bound by the same liability which under section 38 of the act for the incorporation of railroad companies, *1 R. S. 1876, p. 712*, attaches to an ordinary stockholder in such company for labor done in the construction of its road. *Shipley v. Terre Haute*, 345.

19. Section 38 of said act for the incorporation of railroad companies is constitutional, its provisions being matter properly connected with the subject of the title of such act within the meaning of section 18, article 4, of the constitution. Id.

20. A stock company, not having express power granted to declare a forfeiture of stock for non-payment, may sue for the amount of subscription to stock, and on failure to collect full amount subscribed, may collect residue by sale of stock subscribed for. *Chase v. E. T., etc., R. R. Co.*, 349.

21. The individual or personal liability of stockholders, under section 79 of the corporation act of May 1, 1863 (*1 S. & C. 510*); also under section 8 of April 16, 1861, regulating street railroad companies (*S. & S. 136*), attaches in favor of creditors at the time the debt was contracted or the liability incurred by the corporation. *Brown v. Hitchcock*, 353.

22. After such liability attaches to a stockholder, it is not discharged by the subsequent assignment or transfer of his stock; but the successive assignees or holders, by accepting the stock, and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him as stockholder while he held the stock. Id.

23. In a suit by creditors to enforce such liability against the stockholders of an insolvent corporation, the existing stockholders are severally chargeable with the payment of such liability. Id.

24. If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency. Id.

25. One may render himself liable as stockholder in a corporation as well by his conduct in respect to the stock of the corporation, as by formal subscription and acceptance of stock. *Griswold v. Seligman*, 371.

26. Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but was

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them "in trust," as declared by a resolution of the board of directors, "as it was expressed in an entry on the stock book of the and while so holding the stock, defendants voted it at one election of the directors and other officers, and thereby obtained complete corporation;—*Held*, that they were estopped to deny that they were and were liable as such, both to the corporation and its creditors; or as the creditors were concerned, whether they became such before or after they had so treated the stock or not. *Id.*

Stock is held under a written contract, as security for advances, it is not to show that there was a verbal understanding that the bailees had the privilege of voting the stock. *Id.*

§ 9, p. 801, Wag. Stat., in relation to railroad companies, provides that holding stock in any such company . . . as collateral shall be personally subject to any liability as a stockholder of such company, and the person pledging such stock shall be considered as holding the stock and be liable as a stockholder accordingly." *Held*, that this section applies to stock which has not been issued in the usual course of business, and therefore, does not exempt from liability a person holding as collateral unsubscribed stock issued to him by the company. *Id.*

The filing of plaintiff's articles of association defendant subscribed to its capital stock, and thereafter paid two instalments of ten per cent on his subscription, pursuant to calls by the company. *Held*, that the subscription was valid and binding, and became so on the payment of the first instalment. *Buffalo, etc., R. R. Co. v. Grifford*, 887.

It is absolutely necessary to its validity that the subscription be made by the directors for that purpose. If the directors adopt one mode or another, every purpose of the statute is satisfied. *Id.*

See CORPORATION, 1, 2.

§ 8, 808.

See CORPORATION, 19-23; STOCK.

See PLEADING AND PRACTICE, 16-25; STREET RAILWAY.

RAILROADS.

By municipal legislation, the erection of sheds or awnings over the tracks in a particular manner, is prohibited, sheds or awnings not constructed in that manner forbidden, are not nuisances. *Laviosa v. Chicago, etc.*, 88.

Courts will not take judicial cognizance of municipal legislation. Its execution cannot be proven as any other fact. *Id.*

A railroad company cannot, of its own authority, demolish such a shed or structure solely because it obstructs the use of its track. *Id.*

If a railroad company provokes the deed and furnishes the labor necessary for its accomplishment, the fact that the demolition of such a shed or structure was ordered without lawful authority, by one municipal officer, and the superintendence of another, does not make the railroad company liable in the wrong and responsible as such. *Id.*

A municipal corporation cannot treat a particular thing as a nuisance, without legislation declaring all things of its kind to be such. *Id.*

A railroad company may be compelled to use the streets in such a manner as to cause the least possible injury upon private individuals, compatible with the convenience of the public who makes use of its road.

Courts will afford a remedy against the use of streets, by railroads, in such a manner as to be needlessly and unreasonably injurious to private persons, even if the particular mode of use is expressly authorized by municipal legis-

lation, if it is exercised in good faith, by the council of a city or village, of the dis-

STATE, LIEN OF, 4

REMOVAL OF SUIT

RES GESTÆ, 115.

ROLLING STOCK, 48

ROUTE, SURVEY OF

STATUTE.

1. Where a statute the supreme court of south, does not carry had been rendered b See CORPORATION, 2

STOCK.

1. Where preferred holders, although they are first entitled to including all arrears thing. Boardman v

2. A shareholder in its until a division b

3. When a dividend time, but until such signment by a stock the assets, including

4. While as a agent to the propriety of proper exercise of fixed by contract, as be asserted by an action, and, when in such right. Id.

5. In 1857 the M. teed stock; the certified dividends at the rate out of the net earnings stock in any excess, teed. Said company obligations. No dividends were not set upon the common dividends, for the purpose of minutes, contained N. I. R. R. Co., offered and received contract and could whole proceeding as constituting the

6. The resolution issued to be issued should be applied in effect the contract dividends were not only specific charge upon

STOCK—Continued.

holder to demand of the company the privileges and benefits to which the or shareholder was entitled.

3. In the absence of a charter or statutory provision requiring a transfer of stock in the books of the company, as between the shareholder and his assignee, to pass to a creditor, the interest of the creditor must be regarded as subordinate to that of the bona fide assignee.

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17. The owner of a certificate of stock in an incorporated company, placed his certificate, with a blank transfer indorsed thereon, in the hands of another for the purpose of sale; the agent filled the blank with his own name and afterwards indorsed thereon a transfer from himself to a purchaser. *Held*:

1. The original owner having given to his agent possession of the certificate with the external indicia of ownership and the right of disposal, the subsequent transfer by the agent clothed the purchaser with the apparent legal title.

2. The rights of the purchaser did not depend on the actual title or authority of the agent to sell, but upon the act of the original owner giving the apparent authority of disposal, and which would estop him and his assignee.

3. The title of the purchaser would be subject to be defeated by a superior title in the original owner, if acquired with notice of it, or without valuable consideration.

4. In the absence of statutory or charter provision, the books of the company could not operate as notice of the ownership of the stock, further than for the use and benefit of the company itself. Id.

18. A city, having subscribed to the stock of a railroad company, under the act of May 4th, 1869, authorizing cities to aid in the construction of railroads, 1 R. S. (revised) 1876, p. 299, is bound by the same liability which under section 88 of the act for the incorporation of railroad companies, 1 R. S. 1876, p. 712, attaches to an ordinary stockholder in such company for labor done in the construction of its road. *Shipley v. Terre Haute*, 345.

19. Section 88 of said act for the incorporation of railroad companies is constitutional, its provisions being matter properly connected with the subject of the title of such act within the meaning of section 19, article 4, of the constitution. Id.

20. A stock company, not having express power granted to declare a forfeiture of stock for non-payment, may sue for the amount of subscription to stock, and on failure to collect full amount subscribed, may collect residue by sale of stock subscribed for. *Chase v. E. T., etc., R. R. Co.*, 349.

21. The individual or personal liability of stockholders, under section 79 of the corporation act of May 1, 1852 (1 S. & C. 310); also under section 8 of April 10, 1861, regulating street railroad companies (S. & S. 130), attaches in favor of creditors at the time the debt was contracted or the liability incurred by the corporation. *Brown v. Hitchcock*, 353.

22. After such liability attaches to a stockholder, it is not discharged by the subsequent assignment or transfer of his stock; but the successive assignees or holders, by accepting the stock, and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him as stockholder while he held the stock. Id.

23. In a suit by creditors to enforce such liability against the stockholders of an insolvent corporation, the existing stockholders are severally chargeable with the payment of such liability. Id.

24. If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency. Id.

25. One may render himself liable as stockholder in a corporation as well by his conduct in respect to the stock of the corporation, as by formal subscription and acceptance of stock. *Griswold v. Seligman*, 371.

26. Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but

Continued.

by them "in trust," as declared by a resolution of the board of directors in escrow," as it was expressed in an entry on the stock book of the corporation; and while so holding the stock, defendants voted it at one election to elect the directors and other officers, and thereby obtained complete control of the corporation;—*Held*, that they were estopped to deny that they were officers, and were liable as such, both to the corporation and its creditors; so far as the creditors were concerned, whether they became such defendants had so treated the stock or not. *Id.*

Where stock is held under a written contract, as security for advances, it is competent to show that there was a verbal understanding that the bailees have the privilege of voting the stock. *Id.*

Section 9, p. 801, Wag. Stat., in relation to railroad companies, provides that a person holding stock in any such company . . . as collateral

shall be personally subject to any liability as a stockholder of such company, but the person pledging such stock shall be considered as holding the stock, and shall be liable as a stockholder accordingly." *Held*, that this section

in application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as co-security unsubscribed stock issued to him by the company. *Id.*

As to the filing of plaintiff's articles of association defendant subscribed for of its capital stock, and thereafter paid two instalments of ten per cent upon his subscription, pursuant to calls by the company. *Held*, that the subscription was valid and binding, and became so on the payment of the first instalment. *Buffalo, etc., R. R. Co. v. Grifford*, 887.

It is not absolutely necessary to its validity that the subscription be made in the manner provided by the directors for that purpose. If the directors adopt one mode by some one else, every purpose of the statute is satisfied. *Id.*

See CORPORATION, 1, 2.

OLDER, 808.

See CORPORATION, 19-23; STOCK.

, 179.

See PLEADING AND PRACTICE, 16-25; STREET RAILWAY.

RAILROADS.

When, by municipal legislation, the erection of sheds or awnings over the streets, in a particular manner, is prohibited, sheds or awnings not constructed in the manner forbidden, are not nuisances. *Laviosa v. Chicago, etc., Co.*, 128.

Courts will not take judicial cognizance of municipal legislation. Its existence must be proven as any other fact. *Id.*

A railroad company cannot, of its own authority, demolish such a shed or structure, simply because it obstructs the use of its track. *Id.*

Where a railroad company provokes the deed and furnishes the labor necessary for its accomplishment, the fact that the demolition of such a shed or structure was ordered without lawful authority, by one municipal officer, and under the superintendence of another, does not make the railroad company the actor in the wrong and responsible as such. *Id.*

A municipal corporation cannot treat a particular thing as a nuisance, without general legislation declaring all things of its kind to be such. *Id.*

A railroad company may be compelled to use the streets in such a manner as to inflict the least possible injury upon private individuals, compatible with the reasonable convenience of the public who makes use of its road.

The courts will afford a remedy against the use of streets, by railroads, in a manner that is needlessly and unreasonably injurious to private persons, even when such particular mode of use is expressly authorized by municipal legislation. *Id.*

The exercise in good faith, by the council of a city or village, of the dis-

STATE, LIEN OF, 460.

See CORPORATION, 29.

REMOVAL OF SUITS, 105.

See PLEADING AND PRACTICE, 5-8.

RES GESTÆ, 115.

See PLEADING AND PRACTICE, 9.

ROLLING STOCK, 488.

See MORTGAGE, 16.

ROUTE, SURVEY OF, 518.

See CORPORATION, 30.

STATUTE.

1. Where a statute of this State is derived from another State, a decision of the supreme court of that State construing it, rendered after its adoption in Missouri, does not carry with it that authoritative force that it would have had if it had been rendered before the adoption. *Griswold v. Seligman*, 371.

See CORPORATION, 24, 28; EMINENT DOMAIN, 8, 4; NEGLIGENCE, 1; PLEADING AND PRACTICE, 10, 14, 25.

STOCK.

1. Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears, before the holders of common stock are entitled to anything. *Boardman v. Lake Shore, etc., R. R. Co.*, 265.

2. A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Id.*

3. When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets, including all undeclared dividends. *Id.*

4. While as a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion, where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action, and, when necessary, to restrain, by injunction, any action adverse to such right. *Id.*

5. In 1857 the M. S. and N. I. R. R. Co. issued certain preferred and guaranteed stock; the certificates therefor stated that the stock was entitled to annual dividends at the rate of ten per cent, payable semi-annually, at days specified, out of the net earnings of the company, and also a share pro rata with the other stock in any excess, and that the payment of the dividends was thereby guaranteed. Said company was consolidated with defendant, the latter assuming its obligations. No dividends were paid upon the said stock until 1863, and the arrears were not subsequently paid although dividends were declared and paid upon the common stock. In an action to compel the payment of the back dividends, for the purpose of showing authority for the issue of the stock, the book of minutes, containing certain resolutions of the board of directors of said M. S. and N. I. R. R. Co. authorizing the issue of the preferred guaranteed stock, was offered and received in evidence under the objection that the certificate was the contract and could not be varied by other evidence. *Held*, no error; that the whole proceeding relating to the issue of the stock could be taken in connection as constituting the one transaction. *Id.*

6. The resolution of the directors declared that dividends on the stock authorized to be issued should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock. *Held*, that this was in effect the contract as expressed in the certificate; and that under it the dividends were not only preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, and in case of a failure in any year to

STOCK—Continued.

earn profits sufficient to pay the dividends specified, they were to be paid as arrears before any dividends were paid upon the common stock. *Id.*

7. There was no proof of plaintiffs' title to the preferred stock except the certificate issued to plaintiffs' testator. *Held*, that in the absence of proof of the issue of other stock of this description the presumption was that plaintiffs' stock was a portion of that so authorized to be issued, and that plaintiffs were the lawful owners. *Id.*

8. Plaintiffs' testator did not become owner of the stock until 1863. *Held*, that the transfer to him carried with it all right to the unpaid dividends. *Id.*

9. The complaint asked and the judgment directed a specific performance of the contract and restrained defendant from paying dividends upon that portion of its common stock which represented the common stock of the M. S. and N. I. R. R. Co. until the amount of the arrears was paid. *Held*, no error; that plaintiff was entitled to the equitable relief granted. *Id.*

10. Also, *held*, that an action was maintainable against defendant alone as the representative of the corporation with which the contract was made. *Id.*

11. Also, *held*, that, as the claim was originally against a foreign corporation, and as the articles of consolidation by which defendant assumed the obligation took effect within six years of the commencement of the action, the statute of limitations did not run against plaintiffs' claim; also that as it did not appear that any action on the part of defendant was induced by the delay in prosecuting said claim, plaintiff was not estopped by such delay. *Id.*

12. Defendant was organized as a corporation under the statutes of several States to operate a continuous line of road running through those States which had previously been operated by the consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining States, were repugnant to the provision of the U. S. Constitution (art. 1, § 8, sub. 8), conferring on Congress the power to regulate commerce with foreign nations and among the several States. *Held*, untenable; that in the absence of any legislation by Congress upon the subject, the power so to legislate existed in the States. *Id.*

13. Also, *held*, that plaintiff was entitled to recover interest. *Id.*

14. The rule laid down by the English authorities where interest upon annuities was refused, *held*, not to apply. *Id.*

15. The mere consolidation of one railroad company with another company since the taking effect of the act of March 1, 1870, authorizing the consolidation of such companies, will not discharge or release a non-assenting subscriber of stock. *Atchison, etc., R. R. Co. v. Phillips Co.*, 826.

16. A certificate of stock in an incorporated company, contained a recital on its face that it was transferable by assignment, and on its surrender to the directors a new certificate of proprietorship would be issued to the assignee. The by-laws authorized transfers of stock, in writing, by the owner thereof, indorsed on the certificate, or on separate paper; and on the delivery thereof to the secretary, together with the original certificate of stock, for registration, new stock would be issued to the assignee. The assignee of the original stockholder, having possession of the original certificate, sued the company for the value of new stock issued to a subsequent assignee of the original holder to whom new stock had issued, without presentation of the original certificate. The plaintiff had not presented his transfer and stock at the secretary's office before the new stock issued. *Held*:

1. The company was estopped from denying that it would hold for the benefit of the holder of the certificate the amount of stock therein specified, until it was presented for cancellation and new stock issued.

2. The non-production of the original certificate of stock was notice to the company that a superior title might be in a third party.

3. Though the certificate was not the share of stock, it was constituted by the company the visible representative of it, and as between the shareholder and his assignee, the equitable, if not the legal, title would pass by a transfer of the certificate, and this, without it being recorded on the books of the company.

4. The certificate and transfer were *prima facie* sufficient to authorize the

STOCK—Continued.

holder to demand of the company the privileges and benefits to which the original holder was entitled.

5. In the absence of a charter or statutory provision requiring a transfer of stock on the books of the company, as between the shareholder and his assignee, to pass title as against a creditor, the interest of the creditor must be regarded as subordinate to that of the bona fide assignee.

6. The company was liable to the assignee of the original stockholder holding the original certificate. *Strange v. H. and T. C. R. R. Co.*, 338.

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1. The original owner having given to his agent possession of the certificate with the external indicia of ownership and the right of disposal, the subsequent transfer by the agent clothed the purchaser with the apparent legal title.

2. The rights of the purchaser did not depend on the actual title or authority of the agent to sell, but upon the act of the original owner giving the apparent authority of disposal, and which would estop him and his assignee.

3. The title of the purchaser would be subject to be defeated by a superior title in the original owner, if acquired with notice of it, or without valuable consideration.

4. In the absence of statutory or charter provision, the books of the company could not operate as notice of the ownership of the stock, further than for the use and benefit of the company itself. *Id.*

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23. In a suit by creditors to enforce such liability against the stockholders of an insolvent corporation, the existing stockholders are severally chargeable with the payment of such liability. *Id.*

24. If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency. *Id.*

25. One may render himself liable as stockholder in a corporation as well by his conduct in respect to the stock of the corporation, as by formal subscription and acceptance of stock. *Griswold v. Seligman*, 371.

26. Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but was

STOCK—Continued.

to be held by them "in trust," as declared by a resolution of the board of directors, or "in escrow," as it was expressed in an entry on the stock book of the corporation; and while so holding the stock, defendants voted it at one election and thus elected the directors and other officers, and thereby obtained complete control of the corporation;—*Held*, that they were estopped to deny that they were stockholders, and were liable as such, both to the corporation and its creditors; and this, so far as the creditors were concerned, whether they became such before defendants had so treated the stock or not. *Id.*

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28. Section 9, p. 801, Wag. Stat., in relation to railroad companies, provides that "no person holding stock in any such company . . . as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company. *Id.*

29. Prior to the filing of plaintiff's articles of association defendant subscribed for shares of its capital stock, and thereafter paid two instalments of ten per cent each upon his subscription, pursuant to calls by the company. *Held*, That the subscription was valid and binding, and became so on the payment of the first instalment. *Buffalo, etc., R. R. Co. v. Grifford*, 887.

30. It is not absolutely necessary to its validity that the subscription be made in a book provided by the directors for that purpose. If the directors adopt one provided by some one else, every purpose of the statute is satisfied. *Id.*

See CORPORATION, 1, 2.

STOCKHOLDER, 808.

See CORPORATION, 19-28; STOCK.

STREET, 179.

See PLEADING AND PRACTICE, 16-25; STREET RAILWAY.

STREET RAILROADS.

1. When, by municipal legislation, the erection of sheds or awnings over the public streets, in a particular manner, is prohibited, sheds or awnings not constructed in the manner forbidden, are not nuisances. *Laviosa v. Chicago, etc., R. R. Co.*, 128.

2. Courts will not take judicial cognizance of municipal legislation. Its existence must be proven as any other fact. *Id.*

3. A railroad company cannot, of its own authority, demolish such a shed or awning, simply because it obstructs the use of its track. *Id.*

4. Where a railroad company provokes the deed and furnishes the labor necessary for its accomplishment, the fact that the demolition of such a shed or awning was ordered without lawful authority, by one municipal officer, and done under the superintendence of another, does not make the railroad company less an actor in the wrong and responsible as such. *Id.*

5. A municipal corporation cannot treat a particular thing as a nuisance, without general legislation declaring all things of its kind to be such. *Id.*

6. A railroad company may be compelled to use the streets in such a manner as to inflict the least possible injury upon private individuals, compatible with the reasonable convenience of the public who makes use of its road.

7. The courts will afford a remedy against the use of streets, by railroads, in a manner that is needlessly and unreasonably injurious to private persons, even though such particular mode of use is expressly authorized by municipal legislation. *Id.*

8. The exercise in good faith, by the council of a city or village, of the dis-

STREET RAILROADS—Continued.

cretion vested in it by Section 2505 R. S., as corrected (77 O. L. 42), to grant permission to any corporation, company or individual, owning or having the right to construct a street railroad, to extend its track, where the council may deem such extension beneficial to the public, will not be interfered with by the court. *Sims v. Brooklyn, etc., R. R. Co.*, 133.

9. A street railroad corporation, which owns or has the right to construct a street railroad within a city or village, may, with the permission of the council of such city or village duly granted, extend its track beyond the termini named in the certificate of incorporation, subject to the provisions of Section 2505 of the Revised Statutes as corrected (77 O. L. 42). *Id.*

10. The corporate power to make such an extension is conferred by statutes under which the company is incorporated and is acting. The ordinance granting permission to extend the track is not an act conferring corporate powers. It is merely a permit to the corporation to exercise the corporate powers conferred by general law; therefore such an ordinance is not an act conferring corporate powers, which is prohibited by Art. XIII, Sec. 1, of the Constitution of Ohio. *Id.*

11. By the charter of certain street railway companies of Washington and Georgetown, the companies were required to keep their tracks and the adjacent part of the streets, at all times, well paved and in good order, without expense to the United States, and to the District, the District being also bound by statute to take all proper care of its streets and avenues. On the failure of the companies to perform this duty the work was done and paid for by the District, and to obtain reimbursement for the outlay, suit was afterwards brought by it against the companies. *Held*, 1. That after the acceptance of their charters, the companies could not be heard to object that the provision was illegal or incapable of enforcement against them. 2. That the right of action grew out of and was founded upon the obligation in the charters as well of the District as of the companies, and that the suit was an action founded upon those statutes. 3. That the statutory obligation of the companies had been broken if the paving had caused any expense to the District, and this fact would furnish the consideration and foundation of the claim for reimbursement. 4. That the action was not within any of the enumerated actions mentioned in the first section of the Maryland act of 1715, chap. 23, to which the plea of limitations would be available. *Dist. of Columbia v. Washington, etc., R. R. Co.*, 161.

12. When the charter of the companies binds them to pave and keep in repair the streets upon which their tracks are laid and they neglect so to do, and the District thereupon does the work and brings suit against them for reimbursement, the fact that no assessment had been made against the companies by the District for such work is immaterial in its effect upon the right to set up limitations as a defence; the companies occupy the same position with respect to the statute of limitations that they would have held if the amount chargeable against them had been made the subject of a regular assessment which they had refused to pay and for which the action had been brought. *Id.*

13. One-section of the charters of the companies required them to keep their tracks, etc., at all times, well paved and in good order; and by another section it was provided, "that nothing in this act shall prevent the government, at any time, from altering the grades or otherwise improving all avenues or streets occupied by said roads, or the respective cities from so altering or improving such streets or avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of such company to change their said railroad so as to conform to such grade or pavement. The companies' charters also provided, "that the use and maintenance of said road shall be subject to the municipal regulations of the cities of Washington and Georgetown." *Held*, that the companies were bound by the charters not only to pave once the designated portions of the streets, but to repair the paving and to change the grade and lay new pavements within the prescribed limits whenever the municipality, in its discretion, should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies. *Id.*

STREET RAILROADS—Continued.

14. The complainants in their bill alleged, that they were the owners of lots abutting upon D. street or M. avenue, between S. and B. streets in Baltimore County; that the bed of said street or avenue belonged to them, and that the same was a private way. That the defendants without their assent, and claiming incorporation under, and authority by, the Act of 1865, ch. 32, were laying a railway track along said street or avenue to the complainant's injury, without having condemned the right of way, or made any compensation to them for their interest in the soil and the damages incurred. The bill then prayed for an injunction. The answer admitted the complainant's title, but denied that the said street was a private way, and charged it to be a public street or highway, and a very important thoroughfare. It admitted the laying of the railway track, but alleged it was only a horse car railway, which their charter fully authorized, and the defendants disavowed and forever renounced all claim to place a steam railway on said street, and insisted, that the law was wholly within legislative powers. The admissions and proof showed that the street or avenue in question had been thrown open to public use, and had been accepted and used by the public for many years; that lots had been sold calling for said street, and that it had been used for many years as a thoroughfare for all the ordinary modes of transit. *Held:*

1st. That the complainants were estopped from denying it was such street or highway for all the purposes for which it might be fairly inferred that the dedication was intended.

2d. That the Legislature had the power to confer upon the defendants the right to construct and use a horse car railway on said street.

3d. That it was not necessary to determine whether under said Act of 1865, ch. 32, a steam railway, if attempted to be laid, would be without sufficient legal warrant, as the defendants were not laying claim to any such right, but were building a horse car railway only, and renounced all claim to lay any other.

4th. That it did not necessarily follow that said act was wholly unconstitutional because something may be attempted under it, and may in the broad language of the act seem to be covered by it, which the Legislature could not authorize. If the law will admit a construction which will justify that which was being done under it, and which by the terms of the law was clearly warranted by it, to that extent the law ought to be sustained.

5th. That the terms of the act included the right to build a horse car railway, and such railway along a public street or highway is not a new and additional servitude on the land. *Hiss v. Baltimore, etc., R. R. Co.* 201.

15. After the filing of the bill, the time within which, by the terms of the Act of 1865, ch. 32, the defendant was required to complete its road, expired. No supplemental bill was filed suggesting that as an additional reason for the injunction, and subsequent to its expiration the commission to take testimony was issued and executed, and the bill was dismissed by consent pro forma for the purpose of an appeal. *Held:*

1st. That under such circumstances, this court on review must consider all the proceedings as relating to the time of filing the bill, and decide the cause according to the actual rights of the defendants at the time they were, at the instance of the complainants, arrested by injunction from proceeding with a work which was then legitimately authorized.

2d. That the injunction granted originally on the complainants' prayer, ought not to have been granted when it was granted, therefore the final order dissolving it was correct.

3d. That to hold otherwise on this point would in effect be declaring a forfeiture of the defendant's charter in an incidental way, without any proceedings instituted for that purpose. *Id.*

See NEGLIGENCE, 12-14, 50, 51; PLEADING AND PRACTICE, 16-25.

SUBSCRIPTION TO STOCK.

1. A contract of subscription to stock provided for the building of the H. J. & S. R. R. according to the survey made by the P. & R. R. Co. The

SUBSCRIPTION TO STOCK—Continued.

original route ran within five hundred feet of M.'s mill. This route was changed so as to make it run about twelve hundred feet from said mill. M. contended that this change was material; that it was the location of the original survey that induced his subscription and that his interests were seriously compromised by the alteration, and in a suit against him on his subscription offered evidence to this effect, which the court rejected. *Held*, that the court erred, and that he should have been permitted to show that the alteration in the route was, as to him and his interest, a material variation. *Moore v. Hanover Junc. R. R. Co.*, 256.

See CORPORATION, 24. STOCK.

SURVEY OF ROUTE, 513.

See CORPORATION, 30.

TERMINUS, 191.

See EMINENT DOMAIN, 1-5.

TOWNSHIP, MEASURE OF AID, 337.

See BOND, 4.

—— WHEN NOT RELEASED FROM SUBSCRIPTION, 337.

See BOND, 3.

TRESPASSER, 567.

See NEGLIGENCE, 3, 25, 27, 34; PLEADING AND PRACTICE, 20, 23.

TRUST,

See MORTGAGE.

—— DEED, 14.

See RECEIVER, 7.

TRUSTEE, 430.

See MORTGAGE, 11-15; PLEADING AND PRACTICE, 19, 20.

ULTRA VIRES, 443.

See CORPORATION, 25.

WAIVER, 34.

See RECEIVER, 10.

WITNESS, 114, 444.

See PLEADING AND PRACTICE, 9, 27, 28.

WOOD, CONVERSION OF, 219.

See PLEADING AND PRACTICE, 31-34.









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